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No. 85-500

In the

Supreme Court of the United States.

October Term, 1985

EDWARD G. CARROLL and
JOHN E. BARCLAY
Petitioners
v.
WILLIAM E. ALBERTS and
DONALD T. DEVINE
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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QUESTIONS PRESENTED

1. Whether the First and Fourteenth Amendments of the United States Constitution prohibit the secular state court from adjudicating a dispute between a minister of the United Methodist Church and his immediate superiors within the Church, in a suit for inducing breach of confidentiality between the minister and his psychiatrist, resolution of which turns, under state common law, upon (a) the reasonableness of the superiors' belief that Church law not only permitted but required them to make inquiry about the minister's mental health; (b) express or implied consent by the minister to such inquiry by virtue of his status as a clergyman and his consequent submission to Church law; and (c) proof of damages caused by such breach, including damages claimed because of the minister having been placed in involuntary retirement by the Annual Conference of the Church.

2. Whether the First and Fourteenth Amendments of the United States Constitution prohibit the secular state court from inquiring, either in the above-described dispute between a minister and his superiors within the Church or in the underlying suit against his psychiatrist for breach of confidentiality, into the alleged causal connection between the claimed breach of confidentiality and the decision of the 1973 Annual Conference of the Southern New England Conference of the United Methodist Church, whose members, several hundred clergymen, voted to place the minister-plaintiff in involuntary retirement.

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The opinion of which review is sought is *Alberts* v. *Devine,* 395 Mass. 59, ____ N.E.2d ____ (1985).

STATEMENT OF JURISDICTIONAL GROUNDS

On June 4, 1985, on appeal and on reported questions, the Massachusetts Supreme Judicial Court entered the Order (Appendix A) and opinion (Appendix B) of which review is sought. Jurisdiction of this Court is based upon 28 U.S.C. §1257(3). The rights, privileges and immunities of the Petitioners under the First and Fourteenth Amendments of the United States Constitution were claimed and set up in the proceedings in the Superior Court of the Commonwealth of Massachusetts, the trial court below. No rehearing was sought from the Supreme Judicial Court.

The Supreme Judicial Court's decision has finally determined the federal issues in this case and is ripe for review in this Court under 28 U.S.C. §1257(3). The highest court in the Commonwealth of Massachusetts has clearly rejected the Petitioners' federal constitutional defenses by reversing the grant of summary judgment entered by the trial court in favor of the Petitioners and by vacating the protective order entered by the trial court on constitutional grounds. These defenses and claims are now foreclosed in any further proceedings in the Superior Court. Upon remand and trial, regardless the outcome, the Petitioners and their Church will be subject to precisely that civil inquiry from which they have claimed protection under the First and Fourteenth Amendments. Once a trial is had, it will be too late effectively to review the present order and Petitioners' constitutional rights will have been lost irreparably. *See Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 482 n. 10 (1975), *citing Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949). No possible developments upon remand, short of settlement, could eliminate or minimize this risk of constitutional harm. Since further proceedings cannot remove or otherwise affect this threshold federal issue, and since this federal issue cannot be raised at any subsequent time in the state courts, the Supreme Judicial Court's decision is final for purposes of review in this Court. *See, Cox, supra* at 476-486; *accord, New York* v. *Quarles,* ____ U.S. ____, 81 L. Ed. 2d 550, 554 n. 1, 104 S. Ct. ____ (1984). *Cf. New York* v. *Cathedral Academy,* 434 U.S. 125, 128 n. 4 (1977) (where further proceedings cannot affect threshold federal issue, appellate decision is final for purposes of review by this Court).

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION

FIRST AMENDMENT

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

FOURTEENTH AMENDMENT §1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners, Bishop Edward G. Carroll and Rev. John E. Barclay, and Respondent Rev. William E. Alberts at all relevant times were ordained ministers of the United Methodist Church ("the Church"). In 1972, Rev. Alberts was pastor at Old West Church in Boston, Massachusetts, which was within the District of which Rev. Barclay was Superintendent and within the Southern New England Conference of which Bishop Carroll was Bishop. Bishop Carroll and Rev. Barclay thus were Rev. Alberts' immediate superiors within the Church.

Church law is set forth in the Book of Discipline and defines the duties and relationships among members of the ordained clergy. It provides that each minister is bound to accept whatever appointment is made for him by his Bishop on an annual basis. The Book of Discipline charges a Bishop with assessing annually, in consultation with the minister's District Superintendent, the emotional and mental condition of the minister as well as other criteria affecting his ability to perform the ministerial duties of any particular appointment. Ultimately, a minister's eligibility for appointment is determined, under Church law, by the Annual Conference for each region within the Church, although it is the Bishop who selects the particular appointment. The persons entitled to vote at the Annual Conference on eligibility for appointment (or other "relation" such as retirement) are the ordained clergy within the Conference.

The Book of Discipline also defines the responsibilities of a District Superintendent to include counselling and service as pastor to the clergy within his District.

In early spring, 1973, Bishop Carroll and Rev. Barclay became concerned about Rev. Alberts' condition. He had been treating with a psychiatrist, Dr. Donald T. Devine, for many years but had terminated that relationship rather stormily in November, 1972. He had taken a leave of absence from his church in January, 1973. In March, 1973, he performed a marriage ceremony for two homosexual men against the wishes of Bishop Carroll. It was undecided to what post, if any, he should be appointed at the Annual Conference in June, 1973.

Against that background, on April 9, 1973, Bishop Carroll and Rev. Barclay met with Dr. Devine to talk about Rev. Alberts. As indicated in the record, both Bishop Carroll and Rev. Barclay were interested in helping Rev. Alberts, in counselling him, in addressing the issue of annual appointment or further leave of absence in a way beneficial to his mental health, in short, in carrying out their pastoral and administrative duties as his superiors.

Precisely what was said among Dr. Devine, Bishop Carroll and Rev. Barclay is in dispute. Rev. Alberts has alleged that whatever was said amounted to a breach of confidentiality by Dr. Devine wrongfully induced by Bishop Carroll and Rev. Barclay.

Following that meeting, Rev. Alberts' mental condition and his performing the gay marriage were matters of discussion in meetings of various subcommittees of the Church concerned with appointments, including the Board of Ministry. After Bishop Carroll raised these issues with Rev. Alberts, Rev. Alberts drew them to the attention of the press. Various proposals were made by the Church to Alberts regarding his status for the year 1973-74, but no agreement was reached. Finally, at the June, 1973, Annual Conference, Bishop Carroll and the Board of Ministry recommended that Rev. Alberts be placed in the retired relation[1] for the 1973-74 year. After extensive discussion, including a lengthy statement by Rev. Alberts himself, the over three hundred clergy members of the Annual Conference so voted.

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[1] Retirement is a recognized relation within the Church. It does not amount to expulsion or loss of status as an ordained minister.

The Book of Discipline establishes a tribunal within the Church which has jurisdiction to hear and try charges of misconduct brought by a minister against a Bishop or a District Superintendent. Rev. Alberts never filed charges against Bishop Carroll or Rev. Barclay for having spoken with Dr. Devine, nor did he invoke the jurisdiction of the Church tribunal in any way.[2] Instead, he brought this civil action in the secular state courts in Massachusetts, alleging that his superiors induced Dr. Devine to breach his duty of confidentiality. One defense raised by Bishop Carroll and Rev. Barclay was that they were justified by Church law in doing what they did and that the First and Fourteenth Amendments of the United States Constitution precluded the state courts from adjudicating the content and applicability of Church law. This issue was brought before the trial court on motion for summary judgment (Appendix C), supported by an affidavit of Rev. Barclay (Appendix D) and an affidavit of another Methodist Bishop (Appendix E) who stated that Church law, as expressed in the Book of Discipline and understood and applied by Bishops and other clergymen in the Church, authorized the kind of inquiry made by Bishop Carroll and Rev. Barclay. The affidavit further stated that if Rev. Alberts felt he had been wronged thereby, he could have sought a Church trial. The affidavit also explained that the United Methodist Church is organized in hierarchical fashion. These assertions as to the content of Church law were uncontradicted in the record and the motion for summary judgment was allowed on constitutional grounds (Appendix F).

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[2] His failure to avail himself of the Church tribunal to bring charges *against Bishop Carroll and Rev. Barclay* should not be confused with a ruling by Bishop Carroll at the Annual Conference that charges *against Rev. Alberts,* consisting of eight reasons for the recommendation of retirement, were out of order.

The Petitioners also made a motion for a broad protective order against further inquiry either in pretrial discovery or at trial into the deliberations and decisions made by the Annual Conference or by any Boards or committees of the Church leading up to or constituting the recommendation and vote at the Annual Conference to place Rev. Alberts in the retired relation (Appendix G). Rev. Alberts had sued Dr. Devine as well as Rev. Barclay and Bishop Carroll and claimed as damages his loss of position in the Church. In order to establish a causal connection between that loss and a breach of duty by Dr. Devine or the clerical defendants, it would be necessary for the state courts to probe into the decision-making processes of the Church to determine what part, if any, information revealed by Dr. Devine played in shaping the decisions of the ministers involved in that process. The motion for protective order was allowed by the Superior Court (Appendix H, Item 71) to prevent such an inquiry which would have violated the separation of church and state required by the First and Fourteenth Amendments.

These rulings were reversed on review[3] by the Massachusetts Supreme Judicial Court, which held that:

(1) the case does not involve a dispute about religious faith or doctrine nor about church discipline or internal organization;

(2) even if the Constitution precludes inquiry into the content of Church law so that the court must assume Bishop Carroll and Rev. Barclay had the right under Church law to act as they did, the Constitution does not preclude imposition of liability; and

(3) the Constitution does not bar inquiry into the Church's proceedings culminating in Rev. Alberts' retirement.

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[3] The case went to the Supreme Judical Court on an appeal of the entry of Summary Judgment and on four reported questions which appear at 395 Mass. at 63. The Supreme Judicial Court answers the questions: (1) yes, (2) no answer necessary; (3) no; and (4) no. Only questions (3) and (4) are relevant to this Petition.

ARGUMENT

A. THE STATE COURT'S FORMULATION OF THE ELEMENTS OF AN ACTION FOR INDUCING BREACH OF CONFIDENTIALITY TO INCLUDE THE REASONABLENESS OF ONE'S BELIEFS, IF APPLIED TO THE CLERICAL DEFENDANTS, VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS

The Supreme Judicial Court took notice of the holdings of this Court "that the First Amendment prohibits civil courts from intervening in disputes concerning religious doctrine, discipline, faith, or internal organization. *Jones* v. *Wolf,* 443 U.S. 595, 602 (1979). *Serbian E. Orthodox Diocese for the U.S. & Can.* v. *Milivojevich*, 426 U.S. 696, 709, reh. denied, 429 U.S. 873 (1976). *Presbyterian Church in the U.S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969). *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 727 (1871)." 395 Mass. at 72 (Appendix B, page A.15). However, the Supreme Judicial Court failed to apply that rule properly to this case because it characterized the disputes in this case as not involving religious doctrine, discipline, faith or internal organization. 395 Mass. at 73 (Appendix B, page A.16). That characterization appears without analysis or explanation and is wrong.

The Supreme Judicial Court has now defined the elements of a cause of action for inducing breach of confidentiality under Massachusetts law:

> To establish liability the plaintiff must prove that: (1) the defendant knew or reasonably should have known of the existence of the physician-patient relationship; (2) the defendant intended to induce the physician to disclose information about the patient or

> the defendant reasonably should have anticipated that his actions would induce the physician to disclose such information; and (3) the defendant did not ***reasonably believe*** that the physician could disclose that information to the defendant without violating the duty of confidentiality that the physician owed the patient.

395 Mass. at 70-71 (emphasis added) (Appendix B, pages A.13-14). Under this formulation, as applied to the clerical defendants, the jury would be unable to determine what the beliefs of the defendants were or the reasonableness of those beliefs without evidence of the content of Church law and the interpretation of that law by Bishop Carroll and Reverend Barclay. The Petitioners would be required to prove they were, or believed that they were, in going to talk with Dr. Devine, performing administrative duties for the Church with respect to a minister under their charge and carrying out their sacred calling to minister to one toward whom they had or perceived a duty of pastoral care. Such beliefs would underlie a belief that, because of their relationship to Rev. Alberts in the Church and because of Rev. Alberts having subscribed voluntarily to the same system of Church organization and religious beliefs by becoming a minister of the Church, they could speak with Dr. Devine without subjecting him or themselves to civil legal liability. These issues clearly involve religious doctrine, discipline, faith and internal organization.

Finally the Petitioners would have to defend their beliefs as reasonable! It is difficult to conceive of a rule of law more offensive to the First Amendment. That ordained clergymen should have to defend the reasonableness of their beliefs in a secular court, before a jury of persons who do not share their religious views, is intolerable. Application of the rule to the Petitioners contravenes the First and

Fourteenth Amendments and the decisions of this Court cited above.

B. THE PETITIONERS' FIRST AMENDMENT RIGHTS OUTWEIGH THE INTEREST OF THE STATE IN PERMITTING REV. ALBERTS TO LITIGATE AND RECOVER DAMAGES AGAINST THE PETITIONERS

Having failed to perceive this case as one entailing impermissible adjudication of religious doctrine, faith and organization, the Supreme Judicial Court proceeded to apply a balancing test more appropriately applied to legislation which regulates or prohibits certain religiously motivated conduct. 395 Mass. at 73-74 (Appendix B, pages A.16-17). None of the decisions of this Court relied upon by the Supreme Judicial Court in applying a balancing test involved common law tort issues as between a minister and his superiors. None involved issues of ecclesiastical law as it affects the relationship between a minister and his superiors. None involved disputes which could and should only have been brought before a Church tribunal. None involved a searching inquiry into the decision-making processes of Church bodies regarding the status within the Church of one of its ministers. As will be discussed in this Petition at pages 12-20, *infra*, this case should be decided under the rule in *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976), reh. denied, 429 U.S. 873 (1976), and similar cases.

However, even if a balancing test should be applied to this case, the Supreme Judicial Court balanced the wrong interests, drew the wrong conclusions as regards the imposition of liability on the Petitioners and failed to conduct any balancing at all as regards an adjudication of damages flowing from Dr. Devine's alleged breach. With regard to the imposition of liability the Supreme Judicial

Court weighed the Church's "significant interest in assessing the qualifications of their ministers, and in appointing and retiring them" against a newly recognized "public policy strongly [favoring] judicial recognition of a physician's duty to honor the confidentiality of information gained through the physician-patient relationship." 395 Mass. at 74 (Appendix B, page A.17).

In focusing upon the public interest in recognizing the physician's duty, the Supreme Judicial Court balanced the wrong interest. Even if that interest is the appropriate interest to be balanced against the Petitioners' constitutional rights, the latter should be regarded as outweighing the former. Denying Rev. Alberts a recovery against Bishop Carroll and Rev. Barclay, when he is free to proceed against Dr. Devine, cannot possibly do harm to the public interest in recognizing the *physician's* duty.

The factor which should have been weighed against the Petitioners' religious freedom was the public interest, if any, in restraining the clerical defendants from *asking* Dr. Devine to violate his duty, if that is what they did. The Supreme Judicial Court assumed in this analysis that Church law did authorize the Petitioners to seek information from the psychiatrist. 395 Mass. at 74 (Appendix B, page A.17). Where Rev. Alberts had voluntarily united himself to the Church, he must be held to have done so with an implied consent to its government and was bound to submit to it. *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 728 (1872). Such implied consent necessarily extends to the Petitioners' inquiries of Dr. Devine, which were authorized under Church law. Surely the public interest in relieving Rev. Alberts of the consequences of his having consented to be governed by Church law in his relations with Bishop Carroll and Rev. Barclay does not outweigh their rights of freedom to engage in religiously motivated conduct authorized under Church law. This was the balancing which should have been performed, if at all. Religious freedom is clearly the stronger value.

This conclusion is still more compelling when it is recognized that Dr. Devine was free at all times to decline to discuss Rev. Alberts with the Petitioners. Dr. Devine, not the Petitioners, is and ought to be the ultimate guardian of the confidentiality of information entrusted to him by his patient. With that factor added to the scales, the Petitioners' constitutional rights must prevail.

As regards the issue of damages flowing from a breach by Dr. Devine, the Supreme Judicial Court did not conduct any balancing of interests at all. It merely stated a conclusion that "the First Amendment does not bar judicial inquiry into the church's proceedings culminating in Alberts' failure to gain reappointment." 395 Mass. at 75 (Appendix B, page A.18). If some balancing of interests is appropriate, one would most likely balance a supposed public interest in seeing Rev. Alberts compensated for one particular item of claimed damages against the interests not only of Bishop Carroll and Rev. Barclay but of all members of the Southern New England Conference in conducting their deliberations as to the status and appointment of their ministers without fear of having them subjected to scrutiny by the secular courts. Here again, the religious freedoms protected by the First Amendment outweigh any interest the public might have in the amount of Rev. Alberts' recovery.

C. THE EXISTENCE OF A TRIBUNAL WITHIN THE CHURCH FOR THE ADJUDICATION OF DISPUTES AMONG CHURCH MEMBERS, AND REV. ALBERTS' FAILURE TO AVAIL HIMSELF OF THAT TRIBUNAL, REQUIRED SUMMARY JUDGMENT IN FAVOR OF THE PETITIONERS ON FIRST AMENDMENT GROUNDS

In numerous cases, both this Court and the Massachusetts Supreme Judicial Court have held that if a hierarchical religious organization establishes its own tribunals for resolving disputes among its members, the civil courts will defer to the religious tribunals and will not undertake to adjudicate those disputes. *Presbyterian Church in the U.S.* vs. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 443 (1969); *Wheeler* v. *Roman Catholic Archdiocese of Boston*, 378 Mass. 58, 389 N.E.2d 966 (1979). *See also Jones* v. *Wolf*, 443 U.S. 595 (1979); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, reh. denied, 429 U.S. 873 (1976); *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1872).

This rule should have been applied below in affirming the allowance by the Superior Court of the clerical defendants' Motion for Summary Judgment. In order to establish a claim for tortious inducement of breach of confidentiality, the plaintiff must show that Rev. Barclay and Bishop Carroll did not believe they had the authority or the duty to make an inquiry of Rev. Alberts' former psychiatrist regarding his mental and emotional needs. The existence or nonexistence of such authority and duty, and the reasonableness of the petitioners' beliefs therein, are rooted in the ecclesiastical law of the Church. As a "member in full connection" of the Church, Rev. Alberts had voluntarily submitted to Church law. The Book of Discipline provides:

> Members in full connection with an Annual Conference by virtue of their election and ordination are bound in special covenant with all the ordained ministers of the Annual Conference. In the keeping of this covenant they perform the ministerial duties and maintain the ministerial standards established by those in the covenant. They offer themselves without

> reserve to be appointed and to serve as their superiors in office may direct. They live with their fellow ministers in mutual trust and concern and seek with them the sanctification of the fellowship. Only those shall be elected to full membership who are of unquestionable moral character and genuine piety, sound in the fundamental doctrines of Christianity and faithful in the discharge of their duties.

(Appendix E, page A.52).

As in the *Presbyterian Church* and *Wheeler* cases, the Church is a hierarchical church which, by its own rules and regulations, has created tribunals for adjudicating disputes among its members. Affidavit of Joseph Yeakel, Paragraphs 4, 9 and 10 (Appendix E, pages A.27-28). If Rev. Alberts wished to assert that the Bishop and the District Superintendent were exceeding the scope of their authority in seeking information from Dr. Devine, he could have and should have raised charges against them within the ecclesiastical judicial system and sought a determination of that question by the body best situated, and indeed exclusively permitted, to interpret Church law. The effect of the Court's order and decision is to intrude into the intra-church relationship among ordained clergy and to proscribe consensual conduct which is based upon religious belief by burdening that conduct with the threat of civil liability.

As in the *Presbyterian Church* and *Wheeler* cases, the plaintiff failed to avail himself of the Church tribunal,[4] and resolution of this case cannot be achieved without reference to Church law. As in *Presbyterian Church* and

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[4] The ruling out of order a motion made during the Annual Conference to amend the recommendation of retirement of the plaintiff to an allegation of charges *against the plaintiff*, was merely a parliamentary ruling. (Appendix I, page A.92.) That ruling did not mean charges could not have been made at a different time and place *by* plaintiff *against his superiors*.

Wheeler, the Constitution of the United States required the allowance of the Petitioners' Summary Judgment Motion.

D. THE PLAINTIFF'S CLAIM OF DAMAGES IS A COLLATERAL ATTACK ON THE POLITY OF THE CHURCH, WHICH ATTACK IS PROHIBITED BY THE UNITED STATES CONSTITUTION

In its opinion below, the Supreme Judicial Court did not specifically enumerate damage as a requisite element in establishing the tort of inducing breach of confidentiality. However, in enunciating the existence of such a tort, the Supreme Judicial Court likened it to other intentional torts, 395 Mass. at 71 (Appendix B, at page A.14), of which damage is a required element. *Panko* v. *Consolidated Mutual Ins. Co.*, 423 F.2d 41, 44 n.4 (3d Cir. 1970) ("Whether plaintiff's cause of action is viewed as one for inducing breach of a contract with an implied term of secrecy or one for inducing or participating in a breach of fiduciary duty, plaintiff must show a causal connection between the allegedly tortious conduct and the injury complained of, even if the plaintiff establishes an intentional unprivileged interference."); *Botkin* v. *Miller*, 190 Mass. 411, 416, 77 N.E. 49 (1906) (in claim for interference with advantageous relations based upon a disturbance at plaintiff's barber shop by a group of Orthodox Jews in protest that the shop was being kept open on Saturday, "plaintiff did not go far enough to show that this disturbance was the cause of his loss of business. . . ."); *Chemawa County Golf* v. *Wnuk*, 9 Mass. App. Ct. 506, 510, 402 N.E.2d 1069 (1980) ("It is also of the essence in an action for wrongful interference with contractual relationships that the plaintiff suffer damages as a consequence of the defendant's conduct, and those damages cannot be conjectural or speculative losses.''). In apparent recognition of his obligation to establish actual causation of damages, Rev. Alberts in this case has alleged, in Paragraph 7 of the Complaint, "as a result of the disclosure alleged in Paragraph 6, and using the information communicated thereby as a public justification, Bishop Carroll caused the Plaintiff not to be reappointed as Minister of Old West Church. . . ." (Appendix J, page A.94). He goes on to allege loss of benefits and salary by reason of "the termination of his career as a Methodist Minister.'' (Appendix J, pages A.94 and 95). In paragraph 6(b), he alleges that Petitioners Carroll and Barclay communicated their opinions of the Plaintiff's mental health to "numerous individual members of the Southern New England Conference as well as the various boards, committees and subcommittees of the Conference concerned with the appointment of its ministers to local churches. . . .'' (Appendix J, page A.97).

For the same reason the state courts are prohibited from inquiring into the question of whether Bishop Carroll and Rev. Barclay were justified or reasonably believed they were justified in talking to Dr. Devine, the United States Constitution prohibits the courts from inquiring into the criteria applied by the individual members, boards, committees and subcommittees of the Southern New England Conference in their recommendations and decisions to place Rev. Alberts in retirement.

It is an undisputed fact that Rev. Alberts was retired by vote of the Southern New England Conference of the Church, upon recommendation of the Board of Ministry, on or about June 7, 1973. Affidavit of John Barclay, Paragraphs 6 and 7. (Appendix D, pages A.23-24). That action was prescribed by the Book of Discipline, Paragraph 360, referred to in Reverend Barclay's Affidavit. (Appendix D, page A.24). In conducting the meetings and deliberations and in finally voting retirement, the members of the United Methodist church were exercising their constitutional rights to select the clergy of their church. The Conference, not the Bishop, was that body within the Church charged with making such decisions concerning the selection of its clergy.

Inquiry into those deliberations and decisions is expressly prohibited by the doctrine established by this Court in *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, reh. denied, 429 U.S. 873 (1976). In that case, the plaintiff was a bishop of the defendant church who had been suspended, removed and ultimately defrocked by the church. He sought in a civil action to challenge that decision:

> Nor is there any dispute that questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern; . . .
>
> Yet having recognized that the Serbian Orthodox Church is hierarchical and that the decisions to suspend and defrock respondent Dionisije were made by the religious bodies in whose sole discretion the authority to make those ecclesiastical decisions was vested, the Supreme Court of Illinois nevertheless invalidated the decision to defrock Dionisije on the ground that it was "arbitrary" because a "detailed review of the evidence discloses that the proceedings resulting in Bishop Dionisije's removal and defrockment were not in accordance with the prescribed procedure of the Constitution and the penal code of the Serbian Orthodox Church." [citation omitted] Not only was this "detailed review" impermissible under the First and Fourteenth Amendments, but in reaching this conclusion, the court evaluated conflicting testimony concerning internal church procedures and rejected the

> interpretations of relevant procedural provisions by the Mother Church's highest tribunals.

426 U.S. at 717-18.

As was clear in the instant case from the allegations of the Complaint and the course of discovery up until the hearing on Defendants' Motion for Summary Judgment, Rev. Alberts intended to have the state court conduct a "detailed review" of the proceedings resulting in his retirement. (*See* page 19, *infra.*) Without such evidence, he could not establish the necessary causal relation between the alleged breach of confidence and damages flowing from his retirement. Yet such inquiry is prohibited.

Because the undisputed facts below supported invocation of the First and Fourteenth Amendments by Petitioners Barclay and Carroll, the Superior Court below properly allowed their Motion for Summary Judgment. The Supreme Judicial Court should have answered the third reported question "yes" and affirmed entry of summary judgment.

E. THE SUPERIOR COURT BELOW PROPERLY INVOKED THE FIRST AMENDMENT IN ENTERING THE PROTECTIVE ORDER QUASHING SUBPOENAS AND BARRING FURTHER DISSEMINATION OR USE OF CHURCH-RELATED MATERIALS BROUGHT OUT DURING DISCOVERY IN THIS CASE

Petitioners Carroll and Barclay sought and obtained a broad protective order in conjunction with their Motion for Summary Judgment "...protecting them from infringement upon their First Amendment rights as members of the United Methodist Church, and particularly in their roles as Bishop and District Superintendent respectively," and precluding Rev. Alberts' use of church-related documents and testimony in any further proceedings against Dr. Devine. (Appendix G, pages A.83-84). In support of that Motion, Bishop Carroll and Rev. Barclay relied on their argument that the Constitution prohibited inquiry by civil courts into matters of church doctrine and administration, and that further exposure of church matters to such scrutiny in this case would interfere with their free exercise of religion. The Motion was allowed without written memorandum (Appendix H, page A.89, item 71), except for the following reference in the lower Court's Memorandum on Status of the Parties and Causes of Action for Report. (Appendix K, page A.103). There the Superior Court wrote:

> Although the case against defendant Devine remains facially viable, any further discovery or testimony by the defendants Barclay and Carroll would result in their invocation of the privileges and immunities heretofore discussed.

The Supreme Judicial Court held, however, that the First Amendment was not thus properly invoked.

The clerical defendants' rights under the Constitution protect them from unwarranted intrusion into their religious beliefs and practices, whether the intrusion threatens them as defendants or merely as witnesses. What is more, the issues of justification and causation of damages, to which the church-related evidence would be relevant in a claim against the clerical defendants, are identical to the issues of justification and causation of damages in the Plaintiff's claim against Dr. Devine. In both contexts, the state court would be compelled to determine the applicability and interpretation of ecclesiastic law to resolve the justification issue. Similarly, no matter who the defendant, Rev. Alberts cannot establish a causal connection between Dr. Devine's conversation with the clergymen and his involuntary retirement without asking the state court to scrutinize the Church's decision-making process. The state court would have to determine what role or weight, if any, the disclosures had in that decision as compared with other factors which may have been brought to the attention of those making the decision, such as the marriage of two homosexuals conducted by Rev. Alberts two months before his involuntary retirement (Appendix L, page A.104), his self-avowed initiation of or participation in “a number of projects that were controversial . . . [including] getting arrested at an anti-war sit-in . . .” (Appendix L, page A.104, ¶3), fall-out from his marital problems (see Appendix L, page A.105, ¶13) or any other aspects of his own conduct, including the fact that he was tired and worn out (see Appendix L, page A.110, lines 18-22), which led him to request a leave of absence in January, 1973, six months before his retirement (Appendix L, page A.110, lines 16-24) and which led Bishop Carroll to conclude *before ever talking to Dr. Devine* that he “felt Bill [Alberts] was too sick to function in the ministry.” (Appendix L, page A.112, lines 3-13).

The decision to place Rev. Alberts in the retired relation within the Church was made by vote of literally hundreds of clergymen at the Annual Conference of the Southern New England Conference of the Church. (Appendix I, pages A.91-92). The vote followed lengthy statements by many individuals, including a presentation by Rev. Alberts himself, for whom a special extension of time was approved. (Appendix I, page A.91). Nowhere in the record is it indicated that the Petitioners repeated at the Conference any disclosure made to them by Dr. Devine. It is utter speculation that all or even a majority of those voting on Rev. Alberts' retirement had heard any reference to disclosures by his former psychiatrist. Moreover, even if the voting clergymen knew, how can the weight each of them gave to that information or any other facts or conduct before them, be assayed without having their innermost thoughts, including their standards for ministers within their church, laid bare to the triers of fact in the civil court? The Constitution forbids precisely such an intrusion into "questions of church discipline and the composition of the church hierarchy [which] are at the core of ecclesiastical concern." *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 717, reh. denied, 429 U.S. 873 (1976).

Causation of damages, justification and the Petitioners' beliefs as to their authority are the only issues to which the church-related evidence is conceivably relevant. The state court is precluded from adjudicating these issues. Thus the evidence at issue is not relevant to any issue which can properly be adjudicated. The Superior Court properly entered the protective order and the fourth reported question should be answered "yes."

CONCLUSION

For all of the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States.

October Term, 1985

EDWARD G. CARROLL and
JOHN E. BARCLAY
Petitioners
v.
WILLIAM E. ALBERTS and
DONALD T. DEVINE
Respondents

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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TO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court for the Commonwealth,

At Boston, June 4 1985

In the Case No. SJC-3624

WILLIAM E. ALBERTS

vs.

DONALD T. DEVINE & others

pending in the Superior Court Department of the
Court for the County of Norfolk No. 114902

ORDERED, that the following entry be made in the docket; viz.,—

We hold today that, absent the patient's consent or a serious danger to the patient or to others, a physician owes to a patient a duty not to disclose information gained through the physician-patient relationship, and a violation of that duty gives rise to a cause of action sounding in tort. Therefore, we answer reported question number one "yes." No answer to reported question number two is required. Finally, we conclude that the religion clauses of the First Amendment do not preclude the imposition of liability on Carroll and Barclay nor bar the courts of this Commonwealth from inquiring into the church's proceedings that resulted in Alberts' failure to gain reappointment as minister of Boston's Old West Church. Therefore, we answer reported questions number three and four "no," and, because Carroll and Barclay have not established by uncontroverted affidavits and other supporting materials that Alberts cannot prove his claims, we reverse the grant of summary judgment in favor of Carroll and Barclay and the judgments entered pursuant thereto, vacate the protective order entered below, and remand this case to the Superior Court for further proceedings not inconsistent with this opinion.

By the Court,

, Clerk.

See opinion on file.

A TRUE COPY

Attest:
Deputy Assistant Clerk

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CLERK OF THE COURTS
NORFOLK COUNTY

A.2

WILLIAM E. ALBERTS *vs*. DONALD T. DEVINE & others.[1]

Norfolk. October 5, 1984. — June 4, 1985.

Present: HENNESSEY, C.J., WILKINS, ABRAMS, NOLAN, & O'CONNOR, JJ.

Practice, Civil, Appeal, Report. *Privileged Communication. Privacy. Doctor,* Privileged communication. *Religion. Constitutional Law,* Freedom of religion.

A physician owes to a patient a duty not to disclose, without the patient's consent, confidential medical information about the patient obtained as a result of the physician-patient relationship, except to meet a serious danger to the patient or to others, and a violation of that duty, resulting in damages, gives rise to a cause of action sounding in tort against the physician. [ ]

A person who induces a physician wrongfully to disclose information about a patient may be held liable to the patient for damages that flow from that disclosure provided that the person knew or reasonably should have known of the existence of the physician-patient relationship, intended to induce the physician to disclose the information or reasonably should have anticipated that his actions would induce such disclosure, and did not reasonably believe that the physician could disclose that information without violating the duty of confidentiality that the physician owed the patient. [ ]

In an action seeking to establish the liability of persons who allegedly induced a physician wrongfully to disclose information about a patient, summary judgment was incorrectly ordered where the defendants failed to demonstrate that there was no dispute of material fact that they reasonably believed that the physician could give them the information they sought without violating his duty of confidentiality to the plaintiff. [ ]

Where controversies arose concerning whether a church rule granted religious superiors the right to induce a psychiatrist to disclose confidential medical information about a patient, who was also a minister, and whether a causal connection existed between the psychiatrist's disclosure and the minister's failure to gain reappointment, the religion clauses of the First Amendment to the Federal Constitution, made applicable to the States by the Fourteenth Amendment, neither precluded inquiry by the courts of the Commonwealth into the church's proceedings culminating in the minister's failure to gain reappointment, nor precluded imposition of liability on the clerical superiors. [ ]

---

[1] Edward G. Carroll and John E. Barclay.

In an action by a minister against his psychiatrist and two of the plaintiff's clerical superiors alleging a wrongful disclosure of confidential medical information, the judge improperly invoked the religion clauses of the First Amendment to the Federal Constitution, made applicable to the States by the Fourteenth Amendment, in entering a protective order for the plaintiff's superiors precluding the plaintiff from obtaining discovery and trial evidence bearing on the issue whether a causal connection existed between the psychiatrist's disclosure and the plaintiff's failure to gain reappointment. [ ]

CIVIL ACTION commenced in the Superior Court on March 4, 1975.

A motion to dismiss, a motion to amend the complaint, and motions for summary judgment were heard by *Elizabeth J. Dolan*, J., and questions of law were reported by her to the Appeals Court. The Supreme Judicial Court transferred the case on its own initiative.

Robert J. Doyle (*Bruce V. Keary* with him) for the plaintiff.

Florence E. Freeman for John E. Barclay.

Deborah S. Griffin & Ripley E. Hastings for Edward G. Carroll & another.

Jared H. Adams for Donald T. Devine.

Ann M. Gilmore, for Ad-Hoc Committee of Methodist Ministers on the Separation of Church and State, amicus curiae, submitted a brief.

O'CONNOR, J. In this action, brought by William E. Alberts, a minister of the United Methodist Church, against Donald T. Devine, a psychiatrist, and Edward G. Carroll and John E. Barclay, two of the plaintiff's clerical superiors, we hold that: (1) unless faced with a serious danger to the patient or to others, a physician owes a patient a duty not to disclose without the patient's consent medical information about the patient gained in the course of the professional relationship, and the violation of that duty gives rise to a civil action for whatever damages flow therefrom; (2) a civil action will lie against anyone who, with the requisite state of mind, induces a violation of the physician's duty of confidentiality and thereby causes injury or loss to the patient; and (3) in the circumstances of this case, the religion clauses of the First Amendment to the Constitution of the United States,[2] made applicable to the States by the Fourteenth Amendment, *Everson* v. *Board of Educ.*, 330 U.S. 1, 15 (1947); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940), do not preclude inquiry by the courts of the Commonwealth into church processes regarding the appointment and the discharge of ministers, nor do those clauses preclude the imposition of liability on the clerical defendants.[3]

Alberts's amended complaint alleges that in April, 1973, and for some period of time before that, he was a minister with the Southern New England Conference of the United Methodist Church (conference), that he and the defendant Devine had entered into a contract for the provision of psychiatric services, and that implicit in their relationship was a warranty that Devine would keep confidential "all information, observations and opinions relating to the diagnosis, condition, behavior, and treatment" of Alberts that Devine might gain in his professional capacity. The complaint further alleges that on or about April 9, 1973, in violation of that warranty and in violation of Devine's explicit promise, made during the course of treatment, to "respect the confidential nature of the relationship between doctor and patient," Devine disclosed to the defendant Carroll, Resident Bishop of the Boston Area of the United Methodist Church and President of the conference, or to Carroll's representative, information about Alberts's "diagnosis, condition, behavior or treatment." The complaint alleges that Carroll and the defendant Barclay, District Superintendent of the Greater Boston District of the conference, intentionally induced the disclosure, and that Carroll and Barclay "informed numerous individual members of the [conference], as well as the various boards, committees and subcommittees of that Conference concerned with the appointment of its ministers to local churches, of their opinions of [Alberts's] mental health." Furthermore, it is averred that Carroll expressed to the public and to news reporters his belief that Alberts "was mentally ill and therefore unappointable," and that his "belief was based on 'competent consultation.'" The complaint alleges that Carroll used the information he obtained from Devine to cause Alberts not to be reappointed as minister of the Old West Church in Boston, and that the unauthorized disclosures caused Alberts considerable loss of earning capacity and other financial losses, damage to his reputation, and great mental anguish requiring medical treatment.

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[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

[3] No contention has been made that the Constitution of the Commonwealth provides to any of the defendants greater protection than does the Constitution of the United States. Therefore, we do not consider any question of State constitutional law.

The three defendants filed answers, and Carroll's and Barclay's answer, as amended, included the following defense: "The alleged actions by [Carroll and Barclay], if taken at all, were taken pursuant to their duties and authority as [Alberts's] superiors in the hierarchy of the United Methodist Church and as such are privileged and immune from inquiry by this Court under the First and Fourteenth Amendments of the United States Constitution."

The three defendants filed motions for summary judgment, and Devine filed a motion to dismiss. The judge allowed Carroll's and Barclay's motion for summary judgment, and she allowed their motions for entry of judgment pursuant to Mass. R. Civ. P. 54 (b), 365 Mass. 820 (1974). She denied both of Devine's motions. The judge also denied a motion filed by Alberts to amend his complaint by adding a count for tortious interference with privacy rights. Carroll and Barclay filed a motion for a protective order quashing any subpoena that might be served on them in connection with a trial of the case or on "any other person who was a member of the United Methodist Church in 1972 or 1973." The motion further requested that the judge limit further disclosure of, and exclude from evidence at trial, deposition testimony previously given, and documents previously identified, by Carroll and Barclay or other named individuals associated with the United Methodist Church. Lastly, the motion requested that the judge rule inadmissible at trial "any evidence relating in any way to the conduct, words and thoughts of defendants Barclay and Carroll and of any other members of the United Methodist Church in 1972 or 1973." As grounds for their motion, Carroll and Barclay asserted a "constitutional prohibition of inquiry by the civil courts into matters of church doctrine and administration." The judge allowed the motion in its entirety.

At the same time that she made those rulings, the judge reported the following questions to the Appeals Court: (1) "[W]hether disclosures [of confidential medical information] by a psychiatrist of a former patient constitutes a cognizable cause of action within the Commonwealth of Massachusetts"; (2) "[W]hether a cause of action for invasion of privacy existed within the Commonwealth of Massachusetts prior to July 1, 1974"; (3) "[W]hether the actions of the defendants Barclay and Carroll are within the ambit of the privileges and immunities granted by the First and Fourteenth Amendments of the United States Constitution"; and (4) "[W]hether [the judge] properly invoked the First Amendment in entering the protective order for defendants Barclay and Carroll." We transferred the case to this court on our own initiative.

Before reaching the reported questions, we must consider a procedural matter: In light of the judgments entered for Carroll and Barclay, do our answers to the reported questions have any significance with respect to Alberts's claims against them? "[A]fter verdict or after a finding of facts under Rule 52 . . . [i]f [the judge] is of opinion that an interlocutory finding or order made by [her] so affects the merits of the controversy that the matter ought to be determined by the Appeals Court before any further proceedings in the trial court, [the judge] may report such matter, and may stay all further proceedings except such as are necessary to preserve the rights of the parties." Mass. R. Civ. P. 64, 365 Mass. 831 (1974). Under the rule, a trial judge may report a matter that ought to be determined at the appellate level before judgment is entered or before further proceedings take place. "In essence, the word 'report' connotes a suspension of the trial court's function pending decision by an appellate court." J.W. Smith & H.B.

Zobel, Rules Practice § 64.1 (1981). Rule 64 does not authorize a report after judgment.

It is not clear from the report nor from the judge's memorandum explaining the reasons for the report whether the judge intended that the answers to the reported questions would apply only to the claims against Devine or whether she also intended them to apply to the claims against Carroll and Barclay. In the memorandum, the judge discusses the relevancy of the questions to the claims against Devine, suggesting that, in keeping with rule 64, the judge reported the case solely to expedite the disposition of the claims against Devine. For example, the judge explained that the questions involving the religion clauses are important to the claims against Devine because, in order to establish damages as to Devine, particularly with respect to loss of earnings, Alberts would have to show that the information allegedly disclosed by Devine contributed to Alberts's loss of employment. The judge also observed that, in order to present that proof, inquiry will be necessary into "the processes of appointment or nonappointment by the governing body of the church together with consideration by a civil court of the interpretation and application of certain codes or canons of [the] church as embodied within its 'Book of Discipline.'" Other language in the memorandum, however, suggests that the judge intended that the Appeals Court's answers to the reported questions would also affect the claims against Carroll and Barclay. For example, the memorandum's concluding paragraph states: "The issues raised on the summary judgments are reported after decision and entry of final judgments as to Barclay and Carroll and the issues raised on interlocutory matters of the plaintiff's motion to amend to add a count of invasion of privacy and the denial of the defendant Devine's motion to dismiss for failure to state a cause of action cognizable by this court are further reported due to the nature of the complaint as filed and the status of the pleadings." Without arguing the procedural point, counsel for Carroll and Barclay have assumed that our answers to the questions will apply to Alberts's claims against them. In his brief, Alberts urges us to reverse the grant of summary judgment in favor of Carroll and Barclay, and, in their briefs, Carroll and Barclay request that we affirm that grant. Carroll and Barclay also ask us to affirm the judge's denial of Alberts's motion to add to his complaint a common law claim for invasion of privacy. Although Alberts filed a timely claim of appeal from the entry of judgments in favor of Carroll and Barclay, he has not further perfected the appeal, apparently in reliance on the judge's report as a vehicle for review. See Mass. R. A. P. 5, as amended, 378 Mass. 930 (1979). In light of that reliance, fairness requires that we treat the claims against Carroll and Barclay as if they were here on appeal, with Alberts assigning as error the unfavorable rulings by the trial judge on the reported questions. Therefore, our answers to the questions affect Alberts's claims against Devine, Carroll, and Barclay.

Reported Question 1. A physician's duty not to disclose confidential information. Until this case, we have not confronted the question whether a patient has a nonstatutory, civil remedy against a physician if the physician, without the patient's consent, makes an out-of-court disclosure of confidential information obtained in the course of the physician-patient relationship. In *Bratt* v. *International Business Machs. Corp.*, 392 Mass. 508 (1984), although we focused our attention on a different issue — whether the disclosure of medical information concerning an employee to an employer by a company physician violated the employee's statutory right of privacy granted by G. L. c. 214, § 1B — we "recognize[d] a patient's valid interest in preserving the confidentiality of medical facts relayed to a physician." *Id.* at 522. We also quoted with approval in *Bratt* the New Jersey Supreme Court's statement that "[a] patient should be entitled to freely disclose his symptoms and condition to his doctor in order to receive proper treatment without fear that those facts may become public property. Only thus can the purpose of the relationship be fulfilled." *Bratt* v. *International Business Machs. Corp.*, *supra* at 522-523, quoting *Hague* v. *Williams*, 37 N.J. 328, 336 (1962).

We continue to recognize a patient's valid interest in preserving the confidentiality of medical facts communicated to a physician or discovered by the physician through examination.

"The benefits which inure to the relationship of physician-patient from the denial to a physician of any right to promiscuously disclose such information are self-evident. On the other hand, it is impossible to conceive of any countervailing benefits which would arise by according a physician the right to gossip about a patient's health." *Hague* v. *Williams, supra* at 335-336. "To foster the best interest of the patient and to insure a climate most favorable to a complete recovery, men of medicine have urged that patients be totally frank in their discussions with their physicians. To encourage the desired candor, men of law have formulated a strong policy of confidentiality to assure patients that only they themselves may unlock the doctor's silence in regard to those private disclosures. The result which these joint efforts of the two professions have produced . . . has been urged or forecast *in una voce* by commentators in the field of medical jurisprudence." *Hammonds* v. *Aetna Casualty & Sur. Co.*, 243 F. Supp. 793, 797 (N.D. Ohio 1965), and authorities cited therein. The Supreme Court of Oregon has recently held that a patient in that State has a civil right of recovery if a physician discloses without privilege confidential information obtained from the patient in the course of the physician-patient relationship. *Humphers* v. *First Interstate Bank*, 298 Or. 706 (1985). Patients in Massachusetts deserve no less protection.

Few cases consider the out-of-court physician-patient privilege. "That is undoubtedly due to the fact that the confidentiality of the relationship is a cardinal rule of the medical profession, faithfully adhered to in most instances, and thus has come to be justifiably relied upon by patients seeking advice and treatment." *MacDonald* v. *Clinger*, 84 A.D.2d 482, 483 (N.Y. 1982). Of the courts that have considered the question, most have held that a patient can recover damages if the physician violates the duty of confidentiality that plays such a vital role in the physician-patient relationship. See *Humphers* v. *First Interstate Bank, supra*; *Horne* v. *Patton*, 291 Ala. 701, 708-709 (1974); *Simonsen* v. *Swenson*, 104 Neb. 224, 227 (1920); *Hague* v. *Williams, supra* at 336; *MacDonald* v. *Clinger, supra* at 482; *Hammonds* v. *Aetna Casualty*

& Sur. Co., supra at 802 (Ohio law). Only three decisions have come to our attention in which courts have declined to recognize such a cause of action, and we do not find their reasoning persuasive. See *Logan* v. *District of Columbia,* 447 F. Supp. 1328, 1335 (D.D.C. 1978) (D.C. law); *Collins* v. *Howard,* 156 F. Supp. 322, 324 (S.D. Ga. 1957) (Georgia law); *Quarles* v. *Sutherland,* 215 Tenn. 651, 657 (1965).

The courts that have imposed on physicians a duty of confidentiality and have recognized a cause of action to enforce that duty have grounded their decisions on the determination that public policy favors the protection of a patient's right to confidentiality. Courts have found indications of that public policy in statutes creating a testimonial privilege with respect to confidential communications between a patient and a physician and in licensing statutes that authorize the suspension or revocation of a license to practice medicine if a doctor divulges a professional secret without authorization. The absence of statutes of that type, however, does not indicate that no public policy favoring a patient's right to confidentiality exists. No testimonial privilege statute existed in Alabama when the Supreme Court of Alabama decided *Horne* v. *Patton, supra*. Nor did such a statute exist in New Jersey when the Supreme Court of New Jersey decided *Hague* v. *Williams, supra*. The principle that society is entitled to every person's evidence in order that the truth may be discovered may require a physician to testify in court about information obtained from a patient in the course of treatment. However, that principle has no application to disclosures made out of court. Hence, it does not preclude a cause of action based on such disclosures.

In Massachusetts, the Legislature has demonstrated its recognition of a policy favoring confidentiality of medical facts by enacting G. L. c. 111, §§ 70 and 70E, to limit the availability of hospital records. Furthermore, G. L. c. 233, § 20B, creates an evidentiary privilege as to confidential communications between a psychotherapist and a patient. The fact that no such statutory privilege obtains with respect to physicians generally and their patients, *Bratt* v. *International Business Machs. Corp., supra* at 522 n.22, does not dissuade us from declaring that in this Commonwealth all physicians owe their patients a duty, for violation of which the law provides a remedy, not to disclose without the patient's consent medical information about the patient, except to meet a serious danger to the patient or to others. See *Horne* v. *Patton, supra* at 709; *Simonsen* v. *Swenson, supra* at 227-229; *Hague* v. *Williams, supra* at 336; *MacDonald* v. *Clinger, supra* at 487; *Berry* v. *Moench,* 8 Utah 2d 191, 196-199 (1958); *Hammonds* v. *Aetna Casualty & Sur. Co., supra* at 797.[4]

It is true, as Devine argues, that no Massachusetts case before this one recognizes such a theory of liability. However, as we said in *George* v. *Jordan Marsh Co.,* 359 Mass. 244, 249 (1971), a case in which we recognized for the first time the tort of infliction of emotional distress, "[t]hat is true only because the precise question has never been presented to this court for decision. That argument is therefore no more valid than would be an argument by the plaintiff that there is no record of any Massachusetts law denying recovery on such facts. No litigant is automatically denied relief solely because he presents a question on which there is no Massachusetts judicial precedent. It would indeed be unfortunate, and perhaps disastrous, if we were required to conclude that at some unknown point in the dim and distant past the law solidified in a manner and to an extent which makes it impossible now to answer a question which had not arisen and been answered prior to that point. The courts must, and do, have the continuing power and competence to answer novel questions of law arising under ever changing conditions of the society which the law is intended to serve." In *Smith* v. *Driscoll*, 94 Wash. 441, 442 (1917), although the court found it unnecessary to determine "whether a cause of action lies in favor of a patient against a physician for wrongfully divulging confidential communications," the court "assumed" that "for so palpable a wrong, the law provides a remedy." We, too, believe that for so palpable a wrong, the law provides a remedy.

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[4] In *Bratt* v. *International Business Machs. Corp., supra* at 524, this court concluded that an employer may "have a substantial and valid interest in aspects of an employee's health that could affect the employee's ability effectively to perform job duties." We stated that "when medical information is necessary reasonably to serve such a substantial and valid interest of the employer, it is not an invasion of privacy, under [G. L. c. 214] § 1B, for a physician to disclose such information to the employer." *Id.* In that case, the physician was retained by the employer, and no physician-patient relationship existed. *Id.* at 510, 522 n.21. Furthermore, the court focused only on the privacy statute, and not on the nonstatutory duty of confidentiality we address today. The exception to the rule of confidentiality we announce today is not so broad as to permit a physician to disclose to a patient's employer whatever information might bear on the "employee's ability effectively to perform job duties." *Id.* at 524. Disclosure is permitted only to meet a serious danger to the patient or to others.

In *Hammonds* v. *Aetna Casualty & Sur. Co.*, *supra* at 802-803, the court held that from the contractual relationship between a physician and a patient there arises a fiduciary obligation to hold in trust confidential information. In *MacDonald* v. *Clinger*, *supra* at 486, the court concluded that the physician-patient relationship "contemplates an additional duty springing from but extraneous to the contract and that the breach of such duty is actionable as a tort." This court previously has recognized that the physician-patient relationship possesses fiduciary (see *Warsofsky* v. *Sherman*, 326 Mass. 290, 292 [1950]), as well as contractual (see *Sullivan* v. *O'Connor*, 363 Mass. 579, 583 [1973]), aspects. We hold today that a duty of confidentiality arises from the physician-patient relationship and that a violation of that duty, resulting in damages, gives rise to a cause of action sounding in tort against the physician.

Reported Question 2. Nonstatutory invasion of privacy. On October 23, 1973, the Legislature approved St. 1973, c. 941, "An Act establishing the right of privacy and a remedy to enforce such right." The Act amended G. L. c. 214 by inserting § 1B, providing: "A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages."[5] As the parties recognize, the privacy statute does not apply here because the facts alleged by Alberts occurred in 1972, before the statute's enactment. Therefore, Alberts asks us to recognize for the first time a common law cause of action for invasion of privacy. Before the Legislature established a statutory right of privacy, this court stated that "[w]e need not discuss to what extent in Massachusetts violation of privacy will give rise to tort liability to individuals." *Commonwealth* v. *Wiseman*, 356 Mass. 251, 258 (1969). In a line of earlier cases, we explicitly refused to decide whether a common law right of privacy existed in this Commonwealth. See *Frick* v. *Boyd*, 350 Mass. 259, 263 (1966), and cases cited. We need not decide that question now. Even if there was a right of privacy at common law, that right would not permit recovery in this case beyond the recovery available for a physician's violation of the duty of confidentiality, recognized in our answer to reported question 1, and for the inducement of such a violation, recognized in our answer to question 3.

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[5] General Laws c. 214, as appearing in St. 1973, c. 1114, § 62, contained no § 1B, but, by St. 1974, c. 193, § 1, the Legislature reenacted § 1B as it appeared in St. 1973, c. 941.

Reported Question 3. Effect of the religion clauses. Before discussing the religion clauses, we must consider whether, apart from them, a patient may hold liable one who induces a physician to violate the duty of confidentiality that the physician owes the patient. We hold that one who, with the state of mind we describe below, induces a physician wrongfully to disclose information about a patient, may be held liable to the patient for the damages that flow from that disclosure. The inducement need not be a threat, nor a promise of reward, but "may be a simple request or persuasion exerting only moral pressure." Restatement (Second) Torts § 766, comment k (1979).

To establish liability the plaintiff must prove that: (1) the defendant knew or reasonably should have known of the existence of the physician-patient relationship; (2) the defendant intended to induce the physician to disclose information about the patient or the defendant reasonably should have anticipated that his actions would induce the physician to disclose such information; and (3) the defendant did not reasonably believe that the physician could disclose that information to the defendant without violating the duty of confidentiality that the physician owed the patient. See *Hammonds* v. *Aetna Casualty & Sur. Co.*, *supra* at 803; Restatement (Second) of Torts § 876(b) (1979) ("For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he knows . . . (b) that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself"); Restatement of Torts § 757(c) (1939) (before one is subject to liability for use or disclosure of a trade secret obtained from another one must have notice of the fact that disclosure of the trade secret by the other is a breach of duty) (see *Curtiss-Wright Corp.* v. *Edel-Brown Tool & Die Co.*, 381 Mass. 1, 5-6 [1980]); *Banks* v. *Everett Nat'l Bank*, 305 Mass. 178, 182 (1940) ("one who participates in the breach of trust by a fiduciary is responsible for the damages resulting to the trust if he knew that the fiduciary was committing such a breach or if he had knowledge of such facts that he could not reasonably be held to have acted in good faith"); Restatement (Second) of Torts § 766, comment i (1979) (to be subject to liability for interference with a contractual relationship a person must have knowledge of the contract and that he is interfering with it).

The principle we announce is but an application of the general rule that a plaintiff may hold liable one who intentionally induces another to commit any tortious act that results in damage to the plaintiff. See *Nelson* v. *Nason*, 343 Mass. 220, 222 (1961) (negligence); *Halberstam* v. *Welch*, 705 F.2d 472, 481-486, 487-489 (D.C. Cir. 1983) (burglary and murder); *Cobb* v. *Indian Springs, Inc.*, 522 S.W.2d 383, 387 (Ark.1975) (negligence); *Smith* v. *Thompson*, 103 Idaho 909, 911-912 (Ct. App. 1982) (arson); *Duke* v. *Feldman*, 245 Md. 454, 457 (1966) (assault and battery); *Rael* v. *Cadena*, 93 N.M. 684, 684-685 (Ct. App. 1979) (battery); *Russell* v. *Marlboro Books*, 18 Misc. 2d 166, 179 (N.Y. Sup. Ct. 1959) (libel).

In this case, deposition testimony established that Carroll and Barclay knew of the physician-patient relationship between Devine and Alberts and that they intended to induce Devine to disclose information about Alberts. To be entitled to summary judgment, therefore, apart from consideration of the relationship between church and State, Carroll and Barclay had to demonstrate that there was no dispute of material fact that they reasonably believed that Devine could give them the information they sought without violating his duty of confidentiality owed to Alberts. Carroll and Barclay did not do so.

We now reach the third reported question: "[W]hether the actions of the defendants Barclay and Carroll are within the ambit of the privileges and immunities granted by the First and Fourteenth Amendments of the United States Constitution." We read the reported question to include two questions. First, do the religion clauses preclude the imposition of liability on Carroll and Barclay? And, second, in connection with Alberts's proof of damages, may the court constitutionally inquire into the church's proceedings that resulted in Alberts's failure to gain reappointment as minister of the Old West Church?

We begin with the recognition that the First Amendment prohibits civil courts from intervening in disputes concerning religious doctrine, discipline, faith, or internal organization. *Jones* v. *Wolf*, 443 U.S. 595, 602 (1979). *Serbian E. Orthodox Diocese for the U.S. & Can.* v. *Milivojevich*, 426 U.S. 696, 709 (1976). *Presbyterian Church in the U.S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969). *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 727 (1871). See *United Kosher Butchers Ass'n* v. *Associated Synagogues of Greater Boston, Inc.*, 349 Mass. 595, 598 (1965); *Reardon* v. *Lemoyne*, 122 N.H. 1042, 1047 (1982). Carroll and Barclay claim that, as Alberts's clerical superiors, they had the duty to obtain information about Alberts's mental and emotional well-being, and that the Book of Discipline of the United Methodist Church privileged them to seek such information from Devine. They argue that the principle enunciated in the cases cited above precludes judicial inquiry into the merit of Alberts's claims against them and into the process by which the members of the church voted to retire Alberts. We disagree.

It is clear that the assessment of an individual's qualifications to be a minister, and the appointment and retirement of ministers, are ecclesiastical matters entitled to constitutional protection against judicial or other State interference. *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16-17 (1929). *Kaufmann* v. *Sheehan*, 707 F.2d 355, 358-359 (8th Cir. 1983). However, this case does not involve the propriety of the United Methodist Church's refusal to reappoint Alberts as minister of the Old West Church. Nor does this case involve Alberts's qualifications to serve as a minister. A controversy concerning whether a church rule grants religious superiors the civil right to induce a psychiatrist to violate the duty of silence that he owes to a patient, who happens to be a minister, is not a dispute about religious faith or doctrine nor about church discipline or internal organization. Nor is a controversy concerning the causal connection between a psychiatrist's disclosure of confidential information and a minister's failure to gain reappointment such a dispute.

Even if the First Amendment precludes judicial inquiry as to whether a church rule provided that Carroll and Barclay had the right to seek medical information from Alberts's psychiatrist, so that the court must assume in Carroll's and Barclay's favor the existence of a church rule granting that right, it does not follow that the religion clauses preclude the imposition of liability on Carroll and Barclay. Although the freedom to believe "is absolute," the freedom to act "cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection." *Attorney Gen.* v. *Bailey*, 386 Mass. 367, 375 (1982), quoting *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940). See *Braunfeld* v. *Brown*, 366 U.S. 599, 603 (1961); *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878).

A law, legislatively or judicially created, that would regulate or prevent religiously motivated conduct does not violate the First Amendment if the State's interest in the law's enforcement outweighs the burden that the law imposes on the free exercise of religion. A determination of constitutionality requires a balancing of the competing interests. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-229 (1972). *Prince* v. *Massachusetts*, 321

U.S. 158, 164-170 (1944). *Cantwell* v. *Connecticut, supra* at 307. *Catholic High School Ass'n of the Archdiocese of N.Y.* v. *Culvert,* 753 F.2d 1161, 1169 (2d Cir. 1985). Obviously, the imposition of liability on Carroll and Barclay for inducing a violation of Devine's duty to Alberts would inhibit such conduct. We must determine whether such inhibition burdens the free exercise of religion by Carroll, Barclay, or the United Methodist Church, and if it does, we must then determine whether the Commonwealth possesses an interest sufficiently compelling to justify the burden. See *Wisconsin* v. *Yoder, supra*. *Sherbert* v. *Verner,* 374 U.S. 398, 403-409 (1963). *Catholic High School Ass'n of the Archdiocese of N.Y.* v. *Culvert, supra* at 1171. *Attorney Gen.* v. *Bailey, supra* at 375.

As we have observed, churches have a significant interest in assessing the qualifications of their ministers, and in appointing and retiring them. But, in view of the freedom that ecclesiastical authorities and church members have to determine who the church's ministers will be, and in view of the numerous sources of relevant information available to assist those making such determinations — other than information available only from a minister's physician — a rule that prevents interference with physician-patient relationships will have little impact on the free exercise of religion. On the other hand, as we have discussed earlier in this opinion, public policy strongly favors judicial recognition of a physician's duty to honor the confidentiality of information gained through the physician-patient relationship. We conclude, therefore, that even if it be assumed, without inquiry, that the Book of Discipline or other rule of the United Methodist Church provides that Carroll and Barclay had a right, or even a duty, to seek medical information about Alberts from Devine, the First Amendment does not preclude the imposition of liability on those defendants. We also conclude that the First Amendment does not bar judicial inquiry into the church's proceedings culminating in Alberts's failure to gain reappointment.

Reported Question 4. Protective order. The final reported question asks: "[w]hether the [judge] properly invoked the First Amendment in entering the protective order for defendants

Barclay and Carroll." We answer that question "no." As we have stated, the First Amendment does not preclude civil courts from examining the proceedings that resulted in Alberts's failure to gain reappointment as minister of the Old West Church in order to determine whether that event resulted from wrongful conduct of the defendants. Accordingly, the First Amendment does not present an obstacle to Alberts's right to discovery and trial evidence bearing on that issue. This litigation in no sense involves repetitious inquiry or continuing surveillance that would amount to the excessive entanglement between government and religion that the First Amendment prohibits. See *Lynch* v. *Donnelly,* 104 S.Ct. 1355, 1364 (1984); *Lemon* v. *Kurtzman,* 403 U.S. 602, 611-625 (1971); *Walz* v. *Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 668-669 (1970); *Surinach* v. *Pesquera de Busquets,* 604 F.2d 73, 78 (1st Cir. 1979).

Conclusion. We hold today that, absent the patient's consent or a serious danger to the patient or to others, a physician owes to a patient a duty not to disclose information gained through the physician-patient relationship, and a violation of that duty gives rise to a cause of action sounding in tort. Therefore, we answer reported question number one "yes." No answer to reported question number two is required. Finally, we conclude that the religion clauses of the First Amendment do not preclude the imposition of liability on Carroll and Barclay nor bar the courts of this Commonwealth from inquiring into the church's proceedings that resulted in Alberts's failure to gain reappointment as minister of Boston's Old West Church. Therefore, we answer reported questions number three and four "no," and, because Carroll and Barclay have not established by uncontroverted affidavits and other supporting materials that Alberts cannot prove his claims, we reverse the grant of summary judgment in favor of Carroll and Barclay and the judgments entered pursuant thereto, vacate the protective order entered below, and remand this case to the Superior Court for further proceedings not inconsistent with this opinion.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 114902

WILLIAM E. ALBERTS, PLAINTIFF)
V.)
DONALD T. DEVINE ET AL, DEFENDANTS)

DEFENDANT EDWARD G. CARROLL'S MOTION FOR SUMMARY JUDGMENT

The Defendant Edward G. Carroll moves the Court pursuant to Mass. R. Civ. P. 56 to enter summary judgment in his favor dismissing the Plaintiff's Complaint as to this Defendant, on the ground that there is no genuine issue as to any material fact and this Defendant is entitled to judgment as a matter of law on the following grounds:

1. The Complaint fails to state a claim upon which relief can be granted against this Defendant;

2. Any actions by this Defendant with respect to the Plaintiff which are complained of were permitted and justified by reason of this Defendant's ecclesiastical relationship to the Plaintiff and by reason of his position as a superior to the Plaintiff within the United Methodist Church;

3. This Defendant was at all times material to the Complaint the Bishop of the Southern New England Conference of the United Methodist Church. The Plaintiff was the paster in charge for Old West United Methodist Church within that Conference. It is not within this Court's power to inquire into actions taken by this Defendant with reference to the Plaintiff, while this Defendant was carrying out his duties as Bishop; nor can this Court review the failure of the Plaintiff to be reappointed as Minister of Old West Church because he was retired by vote of the 1973 Annual Conference of the United Methodist Church. The Plaintiff's action, therefore, constitutes a collateral attack upon church polity and doctrines, the Discipline of the United Methodist Church, and is a violation of the First and Fourteenth Amendments to the United States Constitution.

Defendant Edward Carroll
By His attorneys,

Deborah S. Griffin
Peabody & Arnold
One Beacon Street
Boston, Mass. 02108
(617) 523-2100

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. **Superior Court**
Docket Number
114902

WILLIAM E. ALBERTS)
Plaintiff)
)DEFENDANT'S, JOHN E. BARCLAY
vs.)MOTION FOR SUMMARY JUDGEMENT
)
DONALD DEVINE,)
ET ALS, Defendants)

The defendant, John E. Barclay, moves this Court pursuant to Rule 56 of the Massachusetts Rule of Civil Procedure, to enter summary judgement for the defendant, John E. Barclay, dismissing the part of the plaintiff's claim which seeks relief against the defendant, John E. Barclay, on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgement as a matter of law including, but not limited to, the following:

1. The complaint fails to state a cause of action against the defendant John E. Barclay.

2. Should this Court determine that the plaintiff's complaint sets out a cause of action against the defendant, John E. Barclay, for intentional interference with a contractual relation between the plaintiff and the defendant, Donald T. Devine, defendant Barclay was permitted such interference, if any, by reason of his ecclesiastical relationship to plaintiff.

3. The defendant, John E. Barclay, was at all times material to the plaintiff's complaint the District Superintendent of the Greater Boston District of the Southern New England Conference of the United Methodist Church. The plaintiff was the pastor-in-charge of Old West United Methodist Church within Barclay's district. It is not within this Court's power to inquire into actions taken by Barclay with reference to the plaintiff, while Barclay was carrying out his duties as District Superintendent; nor can this Court review the failure of the plaintiff to be reappointed as Minister of the Old West Church, Boston, because he was retired by vote of the 1973 Annual Conference of the United Methodist Church.

The plaintiff's action, therefore, constitutes a collateral attack upon church polity and doctrines, the Discipline of the United Methodist Church and is a violation of the First Amendment of the United States Constitution.

Florence E. Freeman
Attorney for John E. Barclay

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss.	**Superior Court** **Docket Number** **114902**

William E. Alberts)
Plaintiff)
)
vs.) Affidavit of John E. Barclay
)
Donald T. Devine, Et Als)
Defendants)

Before me the undersigned notary public appeared John E. Barclay who, being sworn by me, stated:

1. That I am the John E. Barclay who is a defendant in the above-captioned case. I am a duly ordained elder-or minister-of the United Methodist Church, a member of the Southern New England Conference of the United Methodist Church. From 1969 to 1975 I was the District Superintendent of the Greater Boston District of the Conference.

2. That one of the ministers in my charge as District Superintendent was the plaintiff William E. Alberts. My responsibilities toward him as his District Superintendent are set out in the provisions of the Discipline of the United Methodist Church attached hereto as Exhibit 1.

3. That in keeping with these responsibilities I counselled with him at his request concerning his marital problems and other phases of his service as a minister of the United Methodist Church, and in particular as the minister-in-charge at Old West United Methodist Church, Boston.

4. That as part of my responsibilities toward the plaintiff I inquired of his professional counselor and psychiatrist Donald T. Devine, a defendant in this case, for guidance as how best to assist the plaintiff in his private and church life.

5. That as part of my responsibilities as set out in the Discipline, I advised the Bishop of plaintiff's status and what might be done to help him. I attempted to obtain for plaintiff a leave of absence and succeeded in that effort for plaintiff. It was only after the leave of absence failed that retirement was determined by the Board of Ministry to be the course to follow.

6. That the Board of Ministry of the Conference, with Bishop Carroll presiding, acting in complaince with the Discipline duly moved and voted on or about June 7, 1973, to recommend to the Annual Conference of that year that the plaintiff be retired and the Conference so voted. The vote as recorded in the Conference Journal for 1973 is as follows:

Board of Ministry The report was presented by Oliver Drake, William Coleman, Lloyd Chorpenning and Frank Kaiser, and approved by the Conference. (See Disciplinary Questions) (Journal of Daily Proceedings, p. 530)

* * *

45 what member in full connection have been retired? (List alphabetically giving full name-first, middle, last-in that order)
a this year? William E. Alberts, Earl H. Furgeson, Roger E. Makepeace, Harold D. Smock, Joseph A. Stevenson, James R. Uhlinger. (Disciplinary Questions, p. 569)

7. That action of the Conference in reference to plaintiff was in compliance with the Discipline of the United Methodist Church:

> "Paragraph 360. The Annual Conference may place any ministerial members thereof in the retired relation with or without their consent and irrespective of their age if such relation is recommended by the Board of the Ministry."

JOHN E. BARCLAY

Sworn to and subscribed before,

Florence E. Freeman
Notary Public
My commission expires: 4-28-89

Section X. District Superintendent

354. Duties of a District Superintendent—District superintendents are to be chosen and appointed by the bishop. They shall minister to the needs of the pastors and churches in their district by meeting and counseling with pastors and officials. Among the duties of the district superintendent are the following:

1. To travel through the district in order to preach and oversee the spiritual and temporal affairs of the Church.
2. To schedule and preside, or authorize an elder to preside, in each Charge Conference and in the Annual Church Conference.
3. To administer the program of the Church within the bounds of the district in cooperation with the pastors and the Charge Conferences, to encourage adequate salaries for pastors, to promote a concern for countinuing education for ministers, and to urge financial support of all conference and denominational causes.
4. To supervise the work of pastors in the district and counsel with them concerning their pastoral responsibilities, continuing education, and other matters affecting their ministry and personal life. The district superintendent shall be available for counsel with each pastor's family.
5. To appraise the needs and opportunities of churches within the district; to evaluate fields of labor; and within an ecumenically responsible perspective to initiate new forms of ministry, mergers, yoked fields, and long-range planning and the establishment and closing of churches.
6. To counsel with pastors and committees on Pastor-Parish Relations concerning assignments and to consult with the bishop regarding the appointment of persons approved by the Board of the Ministry.
7. To emphasize ministerial recruitment and education and to advise and encourage candidates for the ministry.
8. To issue and renew licenses to preach in accordance with the action of the district committee on the Ministry or the Board of the Ministry.
9. To cooperate with the district Committee on Church Buildings and Locations and local church Boards of Trustees or building committees in arranging acquisitions, sales, transfers, and mortgages of property and in ensuring that all charters, deeds, and other legal documents conform to the Discipline and to the laws, usages, and forms of the county, state, territory, or country within which such property is situated.
10. To participate with the other district superintendents in submitting a report to the Annual Conference reflecting the state of the conference and setting forth recommendations along with other information pertinent to the operation of the Annual Conference.
11. To see that the provisions of the Discipline are observed and to interpret and decide all questions of church law and discipline raised by the churches in the district, subject to an appeal to the president of the next Annual Conference.
12. To prepare and deliver to the succeeding district superintendent: (a) a list of all abandoned church properties and cemeteries within the bounds of the district; (b) a list of all church properties being permissively used by other religious organizations, with the names of the local trustees thereof; (c) a list of all known endowments, annuities, trust funds, investments, and unpaid legacies belonging to any pastoral charge or organization connected therewith in the district.

Paragraph 354 1972 Discipline of the United Methodist Church
pages 167-168.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 114902

WILLIAM E. ALBERTS)
PLAINTIFF)
)
V.)
)
DONALD T. DEVINE, ET AL,)
DEFENDANTS)

Affidavit Of Bishop Joseph H. Yeakel In Support Of Motion For Summary Judgment

I, BISHOP JOSEPH H. YEAKEL, hereby depose and state as follows:

1. I am a Bishop in the United Methodist Church. I have been a Bishop since 1972 and before that time was an ordained minister in the United Methodist Church since 1952. I am presently serving in the New York West Area of the United Methodist Church with offices in Syracuse, New York.

2. I am familiar with the Book of Discipline of the United Methodist Church and the way in which the Book of Discipline is interpreted and applied by the United Methodist Church and its clergy.

3. Attached hereto are true copies of the following pages and paragraphs of the 1972 Book of Discipline, which was the version of the Book of Discipline, in effect during 1972 and 1973: pages v and vi and paragraphs 7 through 63, pargraph 333, paragraph 354, paragraph 357, paragraphs 390 and 391 and paragraphs 1520, 1521, 1531, 1539 and 1540.

4. The United Methodist Church is a connectional church having pertinent characteristics of hierarchical organization. The organizational units, in ascending order, are the local churches (or charge), districts, and various levels of Conferences. The organizational structure of the church is set forth in paragraphs 7 through 63 of the Book of Discipline attached hereto. Each local minister's immediate superiors in office within the church hierarchy include his/her district superintendent, the bishop and the Board of Ministry in the appropriate Conference. Ordained ministers such as the Plaintiff are referred to as "members in full connection."

5. As indicated in Paragraphs 390.4 and 391.1, among the duties of a bishop is the duty to fix appointments of the preachers, including members in full connection, after consultation with the district superintendents and others.

6. In turn, Paragraph 354.4 and Paragraph 354.6 charge the district superintendents with the duty to supervise and counsel with pastors, including members in full connection, concerning matters affecting their ministry and their personal life, and to confer with the bishop and others regarding appointments within his/her district.

7. Bishops and district superintendents are expected to consider, in their evaluation of ministers for annual appointments, the same criteria which define the qualifications for admission into membership in full connection. Those criteria are set forth in Paragraph 333 of the Book of Discipline.

8. One such qualification is that the candidate for admission "shall have. . . (4) satisfied the board regarding physical, mental, and emotional health...." It is generally regarded among bishops in the United Methodist Church that the mental and emotional health of a minister is an important factor to be considered each year when planning annual appointments of ministers. It is within the authority and is a duty of bishops and district superintendents to seek information regarding the mental and emotional health of the ministers within their jurisdictions. Further evidence of such authority is found in paragraph 357 regarding disability leave.

9. If, upon learning that the bishop and the district superintendent had spoken with his psychiatrist or former psychiatrist, a minister such as the Plaintiff believed such communication with the psychiatrist was beyond the duties and authority of his superiors, the minister could have had recourse to the judicial system established by the United Methodist Church for a determination of that question under church law.

10. Paragraphs 1520, 1521, 1531, 1539 and 1540 indicate that a Bishop or other minister in the United Methodist Church may be brought to trial within the church judicial system. The procedure would have been for the minister to file a charge against the bishop (or the district superintendent) from among those listed in Paragraph 1521. Allegedly unauthorized communications could come under the charges described in Paragraphs 1521(a), (c), or (e).

Signed under the penalties of perjury this ____________ day of ____________________, 1983.

____
Joseph H. Yeakel

STATE OF NEW YORK
, 1983

Before me personally appeared the above-named Joseph Yeakel and swore upon his oath that the foregoing Affidavit is true, to his knowledge.

Notary Public

My Commission Expires: __________

EPISCOPAL GREETINGS

The United Methodist Church is a connectional church. It is not simply an aggregate of congregational units. It has thousands of local churches scattered over the world, and numerous institutions of various kinds, but all these are regarded as a part of a single whole, long known as "the connection." Its ministry is a connectional ministry pledged to the same ordination vows; its laity is a connectional laity, and church membership is in the connection rather than simply in a local church; and the ownership of its property is ultimately in the connection also.

Such a connectional church needs guidelines for its effective operation, and carefully developed organizational patterns for the accomplishment of its mission. Out of this need there has developed across the years the *Book of Discipline*. At first this was a small and modest book indeed, but as the Church has grown and its activities have expanded, it has become a sizable and a much involved volume, covering every aspect of the Church's ongoing life.

Traditionally United Methodists have not only been happy to be guided by the *Discipline* as a book of church law, but they have also usually regarded it with a certain degree of reverence, as representing something of the distilled wisdom of the church across the passage of almost two centuries of time. As a people subject to a respected *Discipline,* they have in turn become at least something of a disciplined people.

United Methodism has not hesitated to change its *Discipline* as new insights have come, as new situations have arisen in church and society, and as new structures for mission have appeared imperative. In fact, each succeeding General Conference has made numerous changes in the *Discipline*. The basic structure of the connectionalism has remained largely what it has been from the beginning, but nevertheless radical alterations in former patterns have been made from time to time as necessity seemed to demand. Thus United Methodism has sought to respond to the particular challenges of the succeeding years and to prove itself a living and growing organism.

The 1972 General Conference has sought to discharge its responsibility with fidelity, and the current issue of the Discipline embodies its considered effort to provide for the entire connection patterns of operation hopefully designed to enable both the general Church and our local churches meet the serious demands of the current hour. We commend it to all our people for their guidance and encouragement, as they work together in a common task and with a common loyalty to Him who is forever the Lord of the church.

The Council of Bishops
Oliver Eugene Slater, President
Roy H. Short, Secretary

A.32

CONTENTS

Note: The basic unit in the Book of Discipline is the paragraph (¶) rather than page, chapter, section, etc. The paragraphs are numbered consecutively within each chapter, but many numbers are skipped between parts and chapters in order to allow for future enactments and to fit with the following plan:

1- 99	The Constitution, Doctrine, Doctrinal Statements, General Rules, and Social Principles
101- 299	The Local Church
301- 499	The Ministry
501- 599	The Lay Worker
601- 799	The Conferences
801-1399	Administrative Order
1401-1499	Church Property
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PART I
THE CONSTITUTION
¶¶ 1-67

The Constitution of The United Methodist Church . . . . *page* *16*

PART II
DOCTRINE AND DOCTRINAL STATEMENTS AND THE GENERAL RULES
¶¶ 68-70

Historical Background . . . . *page* *39*

¶ 5. ***Article V. Ecumenical Relations.***—As part of the Church Universal, The United Methodist Church believes that the Lord of the Church is calling Christians everywhere to strive toward unity, and therefore it will seek, and work for, unity at all levels of church life: through world relationships with other Methodist churches and united churches related to The Methodist Church or The Evangelical United Brethren Church, through councils of churches, and through plans of union with churches of Methodist or other denominational traditions.

¶ 6. ***Article VI. Title to Properties.***—Titles to properties in The Evangelical United Brethren Church and The Methodist Church shall, upon consummation of the union, automatically vest in The United Methodist Church. Nothing in the Plan of Union at any time after the union is to be construed so as to require any local church or any other property owner of the former The Evangelical United Brethren Church or the former The Methodist Church to alienate or in any way to change the title to property contained in its deed or deeds at the time of union, and lapse of time or usage shall not affect said title or control.

DIVISION TWO—ORGANIZATION

Section I. Conferences.

¶ 7. ***Article I.***—There shall be a General Conference for the entire Church with such powers, duties, and privileges as are hereinafter set forth.

¶ 8. ***Article II.***—There shall be Jurisdictional Conferences for the Church in the United States of America and Canada, with such powers, duties, and privileges as are hereinafter set forth;[3] *provided* that in The United Methodist Church there shall be no jurisdictional or central conference based on any ground other than geographical and regional division.

¶ 9. ***Article III.***—There shall be Central Conferences for the Church outside the United States of America and Canada and, if necessary, Provisional Central Conferences, all with such powers, duties, and privileges as are hereinafter set forth.[4]

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[3] *See* Judicial Council Decision 128, *and* Amendment III, ¶ 67.

¶ 10. *Article IV.*—There shall be Annual Conferences as the fundamental bodies of the Church and, if necessary, Provisional Annual Conferences, with such powers, duties, and privileges as are hereinafter set forth.[5]

¶ 11. *Article V.*—There shall be a Charge Conference for each church or charge with such powers, duties, and privileges as are hereinafter set forth.

Section II. General Conference.

¶ 12. *Article I.*—The General Conference shall be composed of not less than 600 nor more than 1,000 delegates, one half of whom shall be ministers and one half lay members, to be elected by the annual Conferences.[6]

¶ 13. *Article II.*—The General Conference shall meet in the month of April or May once in four years at such time and in such place as shall be determined by the General Conference or by its duly authorized committees.

A special session of General Conference, possessing the authority and exercising all the powers of the General Conference, may be called by the Council of Bishops, or in such other manner as the General Conference may from time to time prescribe, to meet at such time and in such place as may be stated in the call. Such special session of the General Conference shall be composed of the delegates to the preceding General Conference or their lawful successors, except that when a particular Annual Conference shall prefer to have a new election it may do so.[7] The purpose of such special session shall be stated in the call, and only such business shall be transacted as is in harmony with the purpose stated in such call unless the General Conference by a two-thirds vote shall determine that other business may be transacted.[8]

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[4] *See* Amendment IV, ¶ 67.

[5] *See* Judicial Council Decision 354.

[6] *See* Judicial Council Decision 333, *and* Amendment I, ¶ 67.

[7] *See* Judicial Council Decisions 221, 226, 228, 238, 302.

[8] *See* Judicial Council Decision 227.

¶ 14. ***Article III.***—The General Conference shall fix the ratio of representation in the General, Jurisdictional, and Central Conferences from the Annual Conferences and the Provisional Annual Conferences, computed on a two-factor basis: (1) the number of ministerial members of the Annual Conference and (2) the number of church members in the Annual Conference; *provided* that each Annual Conference or Provisional Annual Conference, except for the Provisional Annual Conferences of a Central Conference or a Provisional Central Conference, shall be entitled to at least one ministerial and one lay delegate in the General Conference and also in the Jurisdictional or Central Conference.

¶ 15. ***Article IV.***—The General Conference shall have full legislative power over all matters distinctively connectional, and in the exercise of this power shall have authority as follows:[9]

1. To define and fix the conditions, privileges, and duties of church membership which shall in every case be without reference to race or status.

2. To define and fix the powers and duties of elders, deacons, supply preachers, local preachers, exhorters, and deaconesses.[10]

3. To define and fix the powers and duties of Annual Conferences, Provisional Annual Conferences, Missionary Conferences and Missions, and of Central Conferences, District Conferences, Charge Conferences, and Congregational Meetings.

4. To provide for the organization, promotion, and administration of the work of the Church outside the United States of America and Canada.[11]

5. To define and fix the powers, duties, and privileges of the episcopacy, to adopt a plan for the support of the bishops, to provide a uniform rule for their retirement, and to provide for the discontinuance of a bishop because of inefficiency or unacceptability.[12]

6. To provide and revise the Hymnal and Ritual of the Church and to regulate all matters relating to the form and mode of worship, subject to the limitations of the first and second Restrictive Rules.

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[9] *See* Judicial Council Decisions 96, 232, 236, 318, 325.

[10] *See* Judicial Council Decisions 58, 313.

[11] *See* Judicial Council Decision 182.

[12] *See* Judicial Council Decisions 35, 114, 312.

7. To provide a judicial system and a method of judicial procedure for the Church, except as herein otherwise prescribed.

8. To initiate and to direct all connectional enterprises of the Church and to provide boards for their promotion and administration.[13]

9. To determine and provide for raising and distributing funds necessary to carry on the work of the Church.[14]

10. To fix a uniform basis upon which bishops shall be elected by the Jurisdictional Conferences and to determine the number of bishops that may be elected by Central Conferences.

11. To select its presiding officers from the bishops, through a committee; *provided* that the bishops shall select from their own number the presiding officer of the opening session.[15]

12. To change the number and the boundaries of Jurisdictional Conferences upon the consent of a majority of the Annual Conferences in each Jurisdictional Conference involved.[16]

13. To establish such commissions for the general work of the Church as may be deemed advisable.

14. To secure the rights and privileges of membership in all agencies, programs, and institutions in The United Methodist Church regardless of race or status.[17]

15. To enact such other legislation as may be necessary, subject to the limitations and restrictions of the Constitution of the Church.[18]

Section III. Restrictive Rules.

¶ 16. *Article I.*—The General Conference shall not revoke, alter, or change our Articles of Religion or establish any new standards or rules of doctrine contrary to our present existing and established standards of doctrine.[19]

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[13] *See* Judicial Council Decision 214.
[14] *See* Judicial Council Decision 30.
[15] *See* Judicial Council Decision 126.
[16] *See* Judicial Council Decisions 55, 56, 215.
[17] *See* Decisions, 4, 5, Interim Judicial Council.
[18] *See* Judicial Council Decision 215.
[19] *See* Judicial Council Decisions 86, 142, 243, 358.

Article II.—The General Conference shall not revoke, alter, or change our Confession of Faith.

¶ 17. *Article III.*—The General Conference shall not change or alter any part or rule of our government so as to do away with episcopacy or destroy the plan of our itinerant general superintendency.

¶ 18. *Article IV.*—The General Conference shall not do away with the privileges of our ministers of right to trial by a committee and of an appeal; neither shall it do away with the privileges of our members of right to trial before the church, or by a committee, and of an appeal.[20]

¶ 19. *Article V.*—The General Conference shall not revoke or change the General Rules of Our United Societies.[21]

¶ 20. *Article VI.*—The General Conference shall not appropriate the net income of the publishing houses, the book concerns, or the Chartered Fund to any purpose other than for the benefit of retired or disabled preachers, their wives, widows, and children or other beneficiaries of the ministerial pension systems.[22]

¶ 21. *Article VII.*—The General Conference shall not do away with the following rights, which are hereby defined: In order that The Evangelical United Brethren Church shall be assured of effective representation in The United Methodist Church it is agreed that at the level of the General Conference, Jurisdictional Conferences, and Central Conferences and on all boards and agencies at the Annual Conference, Central Conference, Jurisdictional Conference, and General Conference levels, in every instance there shall be chosen, during the first three quadrenniums following union, at least twice the number of representatives coming from The Evangelical United Brethren Church membership as the relative numerical membership in said particular conference would indicate in relationship to the number of representatives coming from The Methodist Church, and further agreed that during such period every General Conference and Jurisdictional Conference, and if practical every Central Conference and Annual Conference, board, or agency, regardless of size, shall have at least one such representative; *provided* that this provision shall not be applied so as to give to representatives coming from The Evangelical United Brethren Church a majority position which, except for this provision, they would not have; and further *provided* that in the Germany Central Conference during the first three quadrenniums following union the relative number of representatives coming from the former Methodist Church and the former *Evangelische Gemeinschaft* shall be equal. The relative numerical membership shall be computed by taking the membership of The Evangelical United Brethren Church as reported immediately prior to union and the total membership of the particular conference immediately after union. The General Conference may adopt legislative rules designed to carry out the intent and spirit of this provision. At the termination of the first three quadrenniums following union, this Article VII shall be automatically deleted from the Constitution.[23]

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[20] *See* Judicial Council Decision 351.

[21] *See* Judicial Council Decision 358.

[22] *See* Judicial Council Decisions 322, 330.

Section IV. Jurisdictional Conferences.

¶ 22. ***Article I.***—The Jurisdictional Conferences shall be composed of as many representatives from the Annual Conferences as shall be determined by a uniform basis established by the General Conference.

¶ 23. ***Article II.***—All Jurisdictional Conferences shall have the same status and the same privileges of action within the limits fixed by the Constitution. The ratio of representation of the Annual Conferences in the General Conference shall be the same for all Jurisdictional Conferences.

¶ 24. ***Article III.***—The General Conferences shall fix the basis of representation in the Jurisdictional Conferences; *provided* that the Jurisdictional Conferences shall be composed of an equal number of ministerial and lay delegates to be elected by the Annual Conferences and the Provisional Annual Conferences.

¶ 25. ***Article IV.***—Each Jurisdictional Conference shall meet at the time determined by the Council of Bishops or its delegated committee, each Jurisdictional Conference convening on the same date as the others and at a place selected by the Jurisdictional Committee on

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[23] *See* Judicial Council Decisions 333, 356.

Entertainment, appointed by its College of Bishops unless such a committee has been appointed by the preceding Jurisdictional Conference.

¶ 26. *Article V.*—The Jurisdictional Conferences shall have the following powers and duties and such others as may be conferred by the General Conferences:

1. To promote the evangelistic, educational, missionary, and benevolent interests of the Church, and to provide for interests and institutions within their boundaries.[24]

2. To elect bishops and to cooperate in carrying out such plans for their support as may be determined by the General Conference.

3. To establish and constitute Jurisdictional Conference boards as auxiliary to the general boards of the Church as the need may appear and to choose their representatives on the general boards in such manner as the General Conference may determine.[25]

4. To determine the boundaries of their Annual Conferences; *provided* that there shall be no Annual Conference with a membership of fewer than fifty ministers in full connection, except by the consent of the General Conference; and *provided* further that this provision shall not apply to Annual Conferences of the former The Evangelical United Brethren Church during the first three quadrenniums after union.

5. To make rules and regulations for the administration of the work of the Church within the jurisdiction, subject to such powers as have been or shall be vested in the General Conference.

6. To appoint a Committee on Appeals to hear and determine the appeal of a traveling preacher of that jurisdiction from the decision of a trial committee.

Section V. Central Conferences.

¶ 27. *Article I.*—There shall be Central Conferences for the work of the Church outside the United States of America and Canada with such duties, powers, and privileges as are hereinafter set forth. The number and boundaries of the Central Conferences shall be determined by the Uniting Conference. Subsequently the General Conference shall have authority to change the number and boundaries of Central Conferences. The Central Conferences shall have the duties, powers, and privileges hereinafter set forth.

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[24] *See* Judicial Council Decision 67.

[25] *See* Judicial Council Decision 183.

¶ 28. *Article II.*—The Central Conferences shall be composed of as many delegates as shall be determined by a basis established by the General Conference. The delegates shall be ministerial and lay in equal numbers.

¶ 29. *Article III.*—The Central Conferences shall meet within the year succeeding the meeting of the General Conference at such times and places as shall have been determined by the preceding respective Central Conferences or by commissions appointed by them or by the General Conference. The date and place of the first meeting succeeding the Uniting Conference shall be fixed by the bishops of the respective Central Conferences, or in such manner as shall be determined by the General Conference.

¶ 30. *Article IV.*—The Central Conferences shall have the following powers and duties and such others as may be conferred by the General Conference:

1. To promote the evangelistic, educational, missionary, social-concern, and benevolent interests and institutions of the Church within their own boundaries.

2. To elect the bishops for the respective Central Conferences in number as may be determined from time to time, upon a basis fixed by the General Conference, and to cooperate in carrying out such plans for the support of their bishops as may be determined by the General Conference.

3. To establish and constitute such Central Conference boards as may be required and to elect their administrative officers.[26]

4. To determine the boundaries of the Annual Conferences within their respective areas.

5. To make such rules and regulations for the administration of the work within their boundaries including such changes and adaptations of the General Discipline as the conditions in the respective areas may require, subject to the powers that have been or shall be vested in the General Conference.[27]

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[26] *See* Judicial Council Decision 69.

[27] *See* Judicial Council Decisions 142, 147, 313.

6. To appoint a Judicial Court to determine legal questions arising on the rules, regulations, and such revised, adapted, or new sections of the Central Conference Discipline enacted by the Central Conference.

7. To appoint a Committee on Appeals to hear and determine the appeal of a traveling preacher of that Central Conference from the decision of a Committee on Trial.

Section VI. Episcopal Administration in Central Conferences.

¶ 31. *Article I.*—The bishops of the Central Conferences shall be elected by their respective Central Conferences and inducted into office in the historic manner.

¶ 32. *Article II.*—The bishops of the Central Conferences shall have membership in the Council of Bishops with vote.

¶ 33. *Article III.*—The bishops of the Central Conferences shall preside in the sessions of their respective Central Conferences.

¶ 34. *Article IV.*—The bishops of each Central Conference shall arrange the plan of episcopal visitation within their Central Conference.

¶ 35. *Article V.*—The Council of Bishops may assign one of their number to visit each Central Conference. When so assigned, the bishop shall be recognized as the accredited representative of the general Church and when requested by a majority of the bishops resident in that conference may exercise therein the functions of the episcopacy.

Section VII. Annual Conferences.

¶ 36. *Article I.*—The Annual Conference shall be composed of ministerial members as defined by the General Conference, together with a lay member elected by each charge, the conference president of the Women's Society of Christian Service, the conference president of United Methodist Men, and the conference lay leader.[28] Each charge served by more than one minister shall be entitled to as many lay members as there are ministerial members. The lay members shall be at least twenty-one (21) years of age[29] and shall have been for the four years next preceding their election members of one of the constituent churches forming this union or of The United Methodist Church.[30]

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[28] *See* Amendments II, VII, ¶ 67.

¶ 37. ***Article II.***—The Annual Conference is the basic body in the Church and as such shall have reserved to it the right to vote on all constitutional amendments, on the election of ministerial and lay delegates to the General and the Jurisdictional or Central Conferences, on all matters relating to the character and conference relations of its ministerial members, and on the ordination of ministers and such other rights as have not been delegated to the General Conference under the Constitution, with the exception that the lay members may not vote on matters of ordination, character, and conference relations of ministers. It shall discharge such duties and exercise such powers as the General Conference under the Constitution may determine.[31]

¶ 38. ***Article III.***—The Annual Conference shall elect ministerial and lay delegates to the General Conference and to its Jurisdictional or Central Conference in the manner provided in this section, Articles IV and V. The persons first elected up to the number determined by the ratio for representation in the General Conference shall be representatives in that body. Additional delegates shall be elected to complete the number determined by the ratio for representation in the Jurisdictional or Central Conference, who, together with those first elected as above, shall be delegates in the Jurisdictional or Central Conference. The additional delegates to the Jurisdictional or Central Conference shall in the order of their election be the reserve delegates to the General Conference.[32] The Annual Conference shall also elect reserve ministerial and lay delegates to the Jurisdictional or Central Conference as it may deem desirable.

¶ 39. ***Article IV.***—The ministerial delegates to the General Conference and to the Jurisdictional or Central Conference shall be elected by the ministerial members in full connection with the Annual Conference or Provisional Annual Conference; *provided* that such delegates shall have been traveling preachers in the constituent churches forming this union or in The United Methodist Church for at least four years next preceding their election and are in full connection with the Annual Conference or Provisional Annual Conference electing them when elected and at the time of holding the General and Jurisdictional or Central Conferences.[33]

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[29] *See* Amendment VI, ¶ 67.

[30] *See* Judicial Council Decisions 24, 113, 129, 349, Decision 7, Interim Judicial Council, and Amendment VI, ¶ 67.

[31] *See* Judicial Council Decisions 78, 79, 132.

[32] *See* Judicial Council Decision 352.

¶ **40.** ***Article V.***—The lay delegates to the General Conference and to the Jurisdictional or Central Conferences shall be elected by the lay members of the Annual Conference or Provisional Annual Conference; *provided* that such delegates be at least twenty-one (21) years of age and shall have been members of one of the constituent churches forming this union or of The United Methodist Church for at least four years next preceding their election, and are members thereof within the Annual Conference electing them at the time of holding the General and Jurisdictional or Central Conferences.[34]

¶ **41.** ***Article VI.***—For a period of twelve years following union, Annual Conferences shall not have their names or boundaries changed without their consent; and during such period Annual Conferences formerly of The Evangelical United Brethren Church may in electing delegates to General, Jurisdictional, and Central Conferences and their superintendents of districts continue their time-honored methods, the provisions of Division Two, Section VII, Arts. IV and V; Division Two, Section VIII, Art. IV; and Division Three, Art. IX, notwithstanding; but nothing herein shall be construed as preventing the elimination of Annual Conferences based on race.

Section VIII. Boundaries.

¶ **42.** ***Article I.***—The United Methodist Church shall have Jurisdictional Conferences made up as follows:

Northeastern—Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, New York, Connecticut, Pennsylvania, New Jersey,

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[33] *See* Judicial Council Decisions 1, 162, 308.

[34] *See* Judicial Council Decisions 346, 354.

Maryland, West Virginia, Delaware, District of Columbia, Puerto Rico, Province of Ontario.

Southeastern—Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Tennessee, Kentucky, Mississippi.

North Central—Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota, Iowa, North Dakota, South Dakota.

South Central—Missouri, Arkansas, Louisiana, Nebraska, Kansas, Oklahoma, Texas, New Mexico.

Western—Washington, Idaho, Oregon, California, Nevada, Utah, Arizona, Montana, Wyoming, Colorado, Alaska, Hawaii, Provinces of Manitoba, Saskatchewan, Alberta, and British Columbia.[35]

¶ 43. ***Article II.***—The work of the Church outside the United States of America and Canada may be formed into Central Conferences, the number and boundaries of which shall be determined by the Uniting Conference, the General Conference having authority subsequently to make changes in the number and boundaries.

¶ 44. ***Article III.***—Changes in the number, names and boundaries of the Jurisdictional Conferences may be effected by the General Conference upon the consent of a majority of the Annual Conferences of each of the Jurisdictional Conferences involved.[36]

¶ 45. ***Article IV.***—Changes in the number, names, and boundaries of the Annual Conferences may be effected by the Jurisdictional Conferences in the United States of America and Canada and by the Central Conferences outside the United States of America and Canada according to the provisions under the respective powers of the Jurisdictional and the Central Conferences.[37]

¶ 46 ***Article V. Transfer of Local Churches.***—1. A local church may be transferred from one Annual Conference to another in which it is geographically located upon approval by a two-thirds vote of those present and voting in each of the following:

a) The Charge Conference

b) The Congregational Meeting of the local church

c) Each of the two Annual Conferences involved

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[35] *See* Amendment V, ¶ 67.

[36] *See* Judicial Council Decisions 55, 56, 85, 215.

[37] *See* Judicial Council Decisions 28, 85, 217, and Decisions 1, 2, Interim Judicial Council.

The vote shall be certified by the secretaries of the specified conferences or meetings to the bishops having supervision of the Annual Conferences involved, and upon their announcement of the required majorities the transfer shall immediately be effective.

2. The vote on approval of transfer shall be taken by each Annual Conference at its first session after the matter is submitted to it.

3. Transfers under the provisions of this article shall not be governed or restricted by other provisions of this Constitution relating to changes of boundaries of conferences.

Section IX. District Conferences.

¶ 47. *Article I.*—There may be organized in an Annual Conference, District Conferences composed of such persons and invested with such powers as the General Conference may determine.

Section X. Charge Conferences.

¶ 48. *Article I.*—There shall be organized in each charge a Charge Conference composed of such persons and invested with such powers as the General Conference shall provide.

¶ 49. *Article II. Election of Church Officers.*—Unless the General Conference shall order otherwise, the officers of the church or churches constituting a charge shall be elected by the Charge Conference or by the members of said church or churches at a meeting called for that purpose, as may be arranged by the Charge Conference, unless the election is otherwise required by local church charters or state or provincial laws.

DIVISION THREE—EPISCOPAL SUPERVISION

¶ 50 *Article I.*—There shall be a continuance of an episcopacy in The United Methodist Church of like plan, powers, privileges, and duties as now exist in The Methodist Church and in The Evangelical United Brethren Church in all those matters in which they agree and may be considered identical; and the differences between these historic episcopacies are deemed to be reconciled and harmonized by and in this Plan of Union and Constitution of The United Methodist Church and actions taken pursuant thereto so that a unified superintendency and episcopacy is hereby created and established of, in, and by those who now are and shall be bishops of The United Methodist Church; and the said episcopacy shall further have such powers, privileges, and duties as are herein set forth.[38]

¶ 51. *Article II.*—The bishops shall be elected by the respective Jurisdictional and Central Conferences and consecrated in the historic manner at such time and place as may be fixed by the General Conference for those elected by the jurisdictions and by each Central Conference for those elected by such Central Conference.[39]

¶ 52. *Article III.*—There shall be a Council of Bishops composed of all the bishops of The United Methodist Church. The council shall meet at least once a year and plan for the general oversight and promotion of the temporal and spiritual interests of the entire Church and for carrying into effect the rules, regulations, and responsibilities prescribed and enjoined by the General Conference and in accord with the provisions set forth in this Plan of Union.

¶ 53. *Article IV.*—The bishops of each Jurisdictional and Central Conference shall constitute a College of Bishops and such College of Bishops shall arrange the plan of episcopal supervision of the Annual Conferences, Mission Conferences, and Missions within their respective territories.

¶ 54. *Article V.*—The bishops shall have residential and presidential supervision in the Jurisdictional Conferences in which they are elected or to which they are transferred. Bishops may be transferred from one jurisdiction to another jurisdiction for presidential and residential supervision under the following conditions: (1) The transfer of bishops may be on either of two bases: (*a*) a jurisdiction which receives a bishop by transfer from another jurisdiction may transfer to that jurisdiction or to a third jurisdiction one of its own bishops eligible for transfer, so that the number transferred in by each jurisdiction shall be balanced by the number transferred out, or (*b*) a jurisdiction may receive a bishop from another jurisdiction and not transfer out a member of its own College of Bishops. (2) No bishop shall be transferred unless he shall have given his specific consent. (3) No bishop shall be eligible for transfer unless he shall have served one quadrennium in the jurisdiction which elected him to the episcopacy. (4) All such transfers shall require the approval by a majority vote of the members, present and voting, of the Jurisdictional Conferences which are involved after consideration by the Committees on Episcopacy. After the above procedures have been followed, the transferring bishop shall become a member of the receiving College of Bishops and shall be subject to residential assignment by that Jurisdictional Conference.

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[38] *See* Judicial Council Decisions 4, 114, 127.
[39] *See* Judicial Council Decision 21.

A bishop may be assigned by the Council of Bishops for presidential service or other temporary service in another jurisdiction than that which elected him, provided request is made by a majority of the bishops in the jurisdiction of the proposed service.

In the case of an emergency in any jurisdiction or Central Conference through the death or disability of a bishop or other cause, the Council of Bishops may assign a bishop from another jurisdiction or Central Conference to the work of the said jurisdiction or Central Conference with the consent of a majority of the bishops of that jurisdiction or Central Conference.

¶ 55. *Article VI.*—The bishops, both active and retired, of The Evangelical United Brethren Church and of The Methodist Church at the time union is consummated, shall be bishops of The United Methodist Church.

The bishops of The Methodist Church elected by the jurisdictions, the active bishops of The Evangelical United Brethren Church at the time of union, and bishops elected by the jurisdictions of The United Methodist Church shall have life tenure. Each bishop elected by a Central Conference of The Methodist Church shall have such tenure as the Central Conference electing him shall have determined.[40]

The Jurisdictional Conference shall elect a standing Committee on Episcopacy, to consist of one ministerial and one lay delegate from each Annual Conference, on nomination of the Annual Conference delegation. The committee shall review the work of the bishops, pass on their character and official administration, and report to the Jurisdictional Conference its findings for such action as the conference may deem appropriate within its constitutional warrant of power. The committee shall recommend the assignments of the bishops to their respective residences, for final action by the Jurisdictional Conference.

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[40] *See* Judicial Council Decisions 4, 303.

¶ 56. ***Article VII.***—A bishop presiding over an Annual, Central, or Jurisdictional Conference shall decide all questions of law coming before him in the regular business of a session;[41] *provided* that such questions be presented in writing and that his decisions be recorded in the journal of the conference.

Such an episcopal decision shall not be authoritative except for the pending case until it shall have been passed upon by the Judicial Council. Each bishop shall report in writing annually all his decisions of law, with a syllabus of the same, to the Judicial Council, which shall affirm, modify, or reverse them.

¶ 57. ***Article VIII.***—The bishops of the several Jurisdictional and Central Conferences shall preside in the sessions of their respective conferences.

¶ 58. ***Article IX.***—In each Annual Conference there shall be one or more district superintendents who shall assist the bishop in the administration of the Annual Conference and shall have such responsibilities and term of office as the General Conference may determine.

¶ 59. ***Article X.***—The bishops shall appoint, after consultation with the district superintendents, ministers to the charges, and they shall have such responsibilities and authorities as the General Conference shall prescribe.

DIVISION FOUR—THE JUDICIARY

¶ 60. ***Article I.***—There shall be a Judicial Council. The General Conference shall determine the number and qualifications of its members, their terms of office, and the method of election and the filling of vacancies.

¶ 61. ***Article II.***—The Judicial Council shall have authority:

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[41] *See* Judicial Council Decision 33.

1. To determine the constitutionality of any act of the General Conference upon an appeal of a majority of the Council of Bishops or one fifth of the members of the General Conference, and to determine the constitutionality of any act of a Jurisdictional or Central Conference upon an appeal of a majority of the bishops of that Jurisdictional or Central Conference or upon the appeal of one fifth of the members of that Jurisdictional or Central Conference.

2. To hear and determine any appeal from a bishop's decision on a question of law made in the Annual Conference when said appeal has been made by one fifth of that conference present and voting.

3. To pass upon decisions of law made by bishops in Annual Conferences.

4. To hear and determine the legality of any action taken therein by any General Conference board or Jurisdictional or Central Conference board or body, upon appeal by one third of the members thereof, or upon request of the Council of Bishops or a majority of the bishops of a Jurisdictional or a Central Conference.

5. To have such other duties and powers as may be conferred upon it by the General Conference.

6. To provide its own methods of organization and procedure.

¶ 62. *Article III.*—All decisions of the Judicial Council shall be final. When the Judicial Council shall declare unconstitutional any act of the General Conference then in session, that decision shall be reported back to that General Conference immediately.

¶ 63. *Article IV.*—The General Conference shall establish for the Church a judicial system which shall guarantee to our ministers a right to trial by a committee and an appeal and to our members a right to trial before the church, or by a committee, and an appeal.

DIVISION FIVE—AMENDMENTS

¶ 64. *Article I.*—Amendments to the Constitution shall be made upon a two-thirds majority of the General Conference present and voting and a two-thirds affirmative vote of the aggregate number of members of the several Annual Conferences present and voting, except in the case of the first, second, and seventh Restrictive Rules which shall require a three-fourths majority of all the members of the Annual Conferences present and voting. The vote, after being completed, shall be canvassed by the Council of Bishops, and the amendment voted upon shall become effective upon their announcement of its having received the required majority.[42]

¶ 65. ***Article II.***—Amendments to the Constitution may originate in either the General Conference or the Annual Conferences.

¶ 66. ***Article III.***—A Jurisdictional Conference may by a majority vote propose changes in the Constitution of the Church, and such proposed changes shall be submitted to the next General Conference. If the General Conference adopts the measure by a two-thirds vote, it shall be submitted to the Annual Conferences according to the provision for amendments.

¶ 67. Amendments

Amendment I [Adopted, 1968]

Amend Division Two, Section II, Article I (¶ 12), by deleting the entire paragraph and substituting the following as new paragraph 12:

Article I.—1. The General Conference shall be composed of not less than 600 nor more than 1,000 delegates, one half of whom shall be ministers and one half lay members.

2. Delegates shall be elected by the Annual Conferences except that delegates may be elected by other autonomous Methodist churches if and when the General Conference shall approve concordats with such other autonomous Methodist churches for the mutual election and seating of delegates in each other's highest legislative conferences.

3. In the case of The Methodist Church in Great Britain, mother church of Methodism, upon mutual approval of the concordat now pending, provision shall be made for the reciprocal election and seating of four delegates, two clergy and two lay.

Amendment II [Adopted, 1968]

Amend Division Two, Section VII, Article I (¶ 36), by adding at the end of the first sentence the words AND THE PRESIDENT OF THE however, that no candidates shall be continued on probation beyond the eighth regular conference session following their admission to probationary membership.

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[42] *See* Judicial Council Decisions 154, 243, 244, 349.

¶ 330. *General Provisions.*—1. An Annual Conference may designate a Bachelor of Divinity or equivalent first professional degree from a school of theology accredited or approved by the University Senate as the minimum educational requirement for probationary membership.

2. The Board of the Ministry shall require a transcript of credits from each applicant before recognizing any of the applicant's educational claims. In case of doubt, the board may submit a transcript to the Division of the Ordained Ministry for evaluation.

3. When probationary members find it necessary to discontinue their theological education, the Board of the Ministry shall review their relation to the Annual Conference. If they desire to continue in the ministry, they shall receive credit in the course of study for their theological work as the Division of the Ordained Ministry shall determine.

4. Probationary members who are regularly appointed to a pastoral charge are subject to the provisions of the Discipline in the performance of their pastoral duties.

5. Probationary members in a special appointment shall relate themselves to the district superintendent in the area where their work is done. The district superintendent shall give them supervision and report annually to their Board of the Ministry.

6. Probationary members received under the provisions of ¶ 328.2 who are pursuing advanced studies in the course of study shall do so in a school for courses of study; *provided,* however, that in a case of emergency or unusual circumstances, on approval by the Board of the Ministry, they may be authorized to pursue no more than one year of the course by correspondence.

7. The educational standards and other requirements for admission and ordination shall be set by the Jurisdictional Conferences for the bilingual Annual and Provisional Annual Conferences and Indian Mission within their territories, by the Central and Provisional Central Conferences for the Annual and Provisional Annual Conferences with-

in their territories, and outside such territories by the Annual or Provisional Annual Conference itself.[10]

¶ 331. *Member in Full Connection.*—**Members in full connection** with an Annual Conference by virtue of their election and ordination are bound in special covenant with all the ordained ministers of the Annual Conference. In the keeping of this covenant they perform the ministerial duties and maintain the ministerial standards established by those in the covenant. They offer themselves without reserve to be appointed and to serve as their superiors in office may direct. They live with their fellow ministers in mutual trust and concern and seek with them the sanctification of the fellowship. Only those shall be elected to full membership who are of unquestionable moral character and genuine piety, sound in the fundamental doctrines of Christianity and faithful in the discharge of their duties.

¶ 332. Members in full connection shall have the right to vote on all matters in the Annual Conference except in the election of lay delegates to the General and Jurisdictional Conferences (¶¶ 601.3, 613.3) and shall have sole responsibility for all matters of ordination, character, and conference relations of ministers. They shall be eligible to hold office in the Annual Conference and to be elected delegates to the General and Jurisdictional Conferences under the provision of the Constitution (¶ 39, Art. IV). Every effective member in full connection who is in good standing in an Annual Conference shall receive an annual appointment by the bishop.

¶ 333. Candidates who have been probationary members for at least two years may be admitted into membership in full connection in an Annual Conference by vote of the ministerial members in full connection, on recommendation of the Board of the Ministry,[11] after they have qualified as follows. They shall have (1) served full-time under episcopal appointment under the supervision of a district superintendent satisfactorily to the Board of the Ministry in one of the positions specified in ¶ 391.1-.6 for one year following the completions of the educational requirements specified in § 3 below; (2) been previously ordained deacons; (3) met educational requirements (including a minimum of two semester or quarter hours in each of the fields of United Methodist history, doctrine, and polity; *provided* that a candidate may meet the requirement by undertaking a special course of study and/or examination in these fields provided and administered by the Division of the Ordained Ministry; see ¶¶ 376.2, 1226.2, 1227, 1232) in either of the following ways: (*a*) graduation with a Bachelor of Divinity or equivalent degree from a school of theology accredited or approved by the University Senate or (*b*) graduation with a Bachelor of Arts or equivalent degree from a college or university approved by the University Senate and completion of two years of advanced study beyond the requirements for probationary membership (¶ 328.2*d*) under the supervision of the Division of the Ordained Ministry in an approved course of study school; (4) satisfied the board regarding physical, mental, and emotional health; (5) prepared at least one written sermon on a specified biblical passage and responded to a written or oral doctrinal examination administered by the Board of the Ministry. The candidate's reflections and the board's response should be informed by the insights and guidelines of Part II of the Discipline of The United Methodist Church. The following questions are guidelines for the preparation of the examination:

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[10] *See* Judicial Council Decision 187.

[11] *See* Judicial Council Decisions 157, 344.

a) What biblical, theological, historical, and experiential evidence would you advance for the belief in one God, the Father Almighty, Maker and Sustainer of all creation?

b) Discuss the Bible as the primary source and norm for belief and practice and indicate how you would relate this to tradition, Christian experience, and reason.

c) Define the Christian understanding of man and of his need for divine grace.

d) How would you interpret the statement: "Jesus Christ is Savior and Lord"?

e) What is your conception of the mission of the Holy Spirit in personal salvation, in the community of faith, and in responsible living in the world?

f) How do you understand the following: (1) repentance, (2) justification, (3) faith, (4) regeneration, (5) sanctification?

g) Describe the nature and function of the Church.

h) What is the significance of the Sacraments, Baptism and the Lord's Supper?

i) What is your basis for the belief in the life after death and what is your understanding of it?

j) What do you understand by "evangelism"?

k) In the light of the Judeo-Christian heritage and the contemporary situation, discuss the place of social action in the program of the Church.

l) How do you understand yourself, your motives, your role, and your commitment as a minister?

m) From the perspectives of Scripture, reason, and tradition, give your understanding of the meaning of ordination.

¶ 334. *Examination for Admission into Full Connection and Associate Membership.*—The bishop as chief pastor shall engage those seeking to be admitted in serious self-searching and prayer to prepare them for their examination before the conference. At the time of the examination the bishop shall also explain to the conference the historic nature of the following questions and seek to interpret their spirit and intent. The questions are these and any others which may be thought necessary:

1. Have you faith in Christ?
2. Are you going on to perfection?
3. Do you expect to be made perfect in love in this life?
4. Are you earnestly striving after it?
5. Are you resolved to devote yourself wholly to God and his work?
6. Do you know the General Rules of our Church?
7. Will you keep them?
8. Have you studied the doctrines of The United Methodist Church?
9. After full examination do you believe that our doctrines are in harmony with the Holy Scriptures?
10. Will you preach and maintain them?
11. Have you studied our form of church discipline and polity?
12. Do you approve our church government and policy?
13. Will you support and maintain them?
14. Will you diligently instruct the children in every place?
15. Will you visit from house to house?
16. Will you recommend fasting or abstinence, both by precept and example?

effective participation in the work of their Annual Conference, assuming whatever responsibilities they are qualified and requested to assume.

5. A conference member serving under special appointment shall be available and on call to administer the Sacraments of Baptism and the Lord's Supper as requested by the district superintendent of the district in which the special appointment is held.

6. A conference member, on recommendation of the conference Board of Discipleship (if any; *see* ¶¶ 1029-30), confirmed by a two-thirds vote of the Annual Conference, may be appointed a conference evangelist; *provided* that the appointee shall meet the standards set by the General Board of Discipleship and conference Board of Discipleship for conference evangelists.

7. At their request, conference members on recommendation of the Cabinet, confirmed by a two-thirds vote of the Annual Conference, may be appointed for ministry in and to society beyond the ministries usually extended through the local church and other institutions of, or directly related to the church; *provided* that in no such case shall The United Methodist Church incur any financial responsibility.

8. Ministers who are probationary or full members may, if they so desire, receive a special appointment to attend any school, college, or theological seminary accredited or approved by the University Senate.

9. All conference secretaries shall submit to the editors of the General Minutes a list of the special appointments made in their Annual Conferences, and there shall be published in the General Minutes a representative list showing the number of ministers in the Church serving in the major categories under special appointment.

10. All effective ordained ministers of The United Methodist Church on special appointment shall hold membership in a Charge Conference of their choice within their Annual Conference. They may hold an affiliate membership without vote in a Charge Conference where they reside.

Section IX. Counseling Elder.

¶ 353. **Counseling elders** are members in full connection in an Annual Conference recommended by the Board of the Ministry and assigned by the Cabinet to provide counsel for lay pastors fulfilling the requirements of the course of study, in the development of their spiritual life and growth, in the administration of the Sacraments, and in all other matters pertaining to the fulfillment of their preaching and pastoral service. Counseling elders shall work under the direction of and in consultation with the district superintendent and shall make regular reports of their activities to the district superintendent and to the Board of the Ministry.

Section X. District Superintendent.

¶ **354.** *Duties of a District Superintendent.*—District superintendents are to be chosen and appointed by the bishop. They shall minister to the needs of the pastors and churches in their district by meeting and counseling with pastors and officials. Among the duties of the district superintendent are the following:

1. To travel through the district in order to preach and oversee the spiritual and temporal affairs of the Church.

2. To schedule and preside, or authorize an elder to preside, in each Charge Conference and in the Annual Church Conference.

3. To administer the program of the Church within the bounds of the district in cooperation with the pastors and the Charge Conferences, to encourage adequate salaries for pastors, to promote a concern for continuing education for ministers, and to urge financial support of all conference and denominational causes.

4. To supervise the work of pastors in the district and counsel with them concerning their pastoral responsibilities, continuing education, and other matters affecting their ministry and personal life. The district superintendent shall be available for counsel with each pastor's family.

5. To appraise the needs and opportunities of churches within the district; to evaluate fields of labor; and within an ecumenically responsible perspective to initiate new forms of ministry, mergers, yoked fields, and long-range planning and the establishment and closing of churches.

6. To counsel with pastors and committees on Pastor-Parish Rela-

tions concerning assignments and to consult with the bishop regarding the appointment of persons approved by the Board of the Ministry.

7. To emphasize ministerial recruitment and education and to advise and encourage candidates for the ministry.

8. To issue and renew licenses to preach in accordance with the action of the district Committee on the Ministry or the Board of the Ministry.

9. To cooperate with the district Committee on Church Buildings and Locations and local church Boards of Trustees or building committees in arranging acquisitions, sales, transfers, and mortgages of property and in ensuring that all charters, deeds, and other legal documents conform to the Discipline and to the laws, usages, and forms of the county, state, territory, or country within which such property is situated.

10. To participate with the other district superintendents in submitting a report to the Annual Conference reflecting the state of the conference and setting forth recommendations along with other information pertinent to the operation of the Annual Conference.

11. To see that the provisions of the Discipline are observed and to interpret and decide all questions of church law and discipline raised by the churches in the district, subject to an appeal to the president of the next Annual Conference.

12. To prepare and deliver to the succeeding district superintendent: (*a*) a list of all abandoned church properties and cemeteries within the bounds of the district; (*b*) a list of all church properties being permissively used by other religious organizations, with the names of the local trustees thereof; (*c*) a list of all known endowments, annuities, trust funds, investments, and unpaid legacies belonging to any pastoral charge or organization connected therewith in the district.

Section XI. Continuing Education.

¶ 355. Ministers shall be encouraged to continue their education throughout their careers, including a carefully developed personal program of study augmented periodically by involvement in organized educational activities. In most cases the ministers' continuing education program should allow for leaves of absence for study at least one week each year and at least one month during one year of each quadrennium. Such leaves shall not be considered as part of the ministers' vacation and shall be planned in consultation with their charges or other agencies to which they are appointed as well as the bishop, district superintendent, and Annual Conference continuing education committee.

Section XII. Sabbatical Leave.

¶ 356. A sabbatical leave may be allowed for an approved program of study or travel. Ministers who have been serving in a full-time appointment for six consecutive years from the time of their reception into full membership, or for eight consecutive years from the time of their reception into associate membership, may be granted a sabbatical leave for one year. Whenever possible, the salary level of the last appointment served before the leave should be maintained in the appointment made at the termination of the leave. The appointment to sabbatical leave is to be made by the bishop holding the conference upon the vote of the Annual Conference after recommendation by the Board of the Ministry. Ministers shall submit a written request for a sabbatical leave including plans for study or travel to the Board of the Ministry, with copies to the bishop and district superintendent, ordinarily ninety days before the opening session of the Annual Conference. To be eligible for an additional sabbatical leave ministers shall have served six consecutive years under full-time appointment following the previous sabbatical leave.

Section XIII. Disability Leave.

¶ 357. 1. When ministers who are associate members, probationary members, or members in full connection in an Annual Conference are forced to give up their ministerial work because of their physical or mental disability, upon joint recommendation of the Board of the Ministry and the conference Board of Pensions and by a majority vote of the ministerial members of the Annual Conference in full connection who are present and voting, they may be granted annual disability leave without losing their relationship to the Annual Conference; *pro-*

vided, however, that such leave may be granted or renewed only after a thorough investigation of the case and examination of medical evidence in accordance with § 3 or § 4 below, up to but not beyond their attainment of the age of voluntary retirement. Each disability leave granted by the Annual Conference shall be recorded in the conference minutes.

2. When ministers are forced to give up their ministerial work between sessions of the Annual Conference on account of physical or mental disability, with the approval of a majority of the district superintendents, after consultation with the officers of the Board of the Ministry and the executive committee of the conference Board of Pensions, a disability leave may be granted by the bishop for the remainder of the conference year; *provided,* however, that such leave may be granted only after examination of medical evidence in accordance with § 3 or § 4 below. Any such leave granted between sessions of the Annual Conference, with the effective date of such leave, shall be entered in the minutes of the next regular session of the conference.

3. Ministers who are currently participating members of the Ministers Reserve Pension Fund at the time a disability occurs may be granted a disability leave only after medical evidence shall have been secured and reviewed by the General Board of Pensions in accordance with the regulations of the Ministers Reserve Pension Fund pertaining to disability benefits.

4. Ministers who are not currently participating members of the Ministers Reserve Pension Fund at the time a disability occurs may be granted a disability leave only after a medical report shall have been submitted to the Joint Committee on Disability (¶ 665.25) by a medical doctor who has been approved by the joint committee. Such report shall be made on a form approved by the General Board of Pensions.

5. When ministers on disability leave recover sufficiently to resume ministerial work, with their consent they may receive an appointment from a bishop between sessions of the Annual Conference, thereby terminating the disability leave. Such appointment shall be reported immediately by the Cabinet to the conference Board of Pensions and to the General Board of Pensions. Such termination of leave, together

with the effective date, shall also be recorded in the minutes of the Annual Conference at its next regular session.

Section XIV. Supernumerary Ministers.

¶ 358. Supernumerary ministers are those who are granted this relationship because of impaired health or who for other equally sufficient reason are temporarily unwilling or unable to perform the full work of their appointment. This relation is to be requested through the Board of the Ministry and granted or renewed by the Annual Conference upon the board's recommendation.[16] Between sessions of the Annual Conference this relation may be granted with the approval of the bishop, district superintendents, and the Board of the Ministry. This interim action shall be subject to the approval of the Annual Conference at its next session. This relation shall not be granted for more than five years in succession except by a two-thirds vote of the conference and must be approved annually. After consultation with the pastor, supernumerary ministers shall designate the Charge Conference in which they shall hold membership. The exercise of their ministry shall be limited to the Charge Conference in which their membership is held and under the supervision of the pastor in charge, to whom they shall report all marriages performed, baptisms administered, and funerals conducted, and shall be held amenable for their conduct and the continuation of their ordination rights to the Annual Conference. Should they reside outside the bounds of the Annual Conference, they shall forward to it annually a certificate similar to that required of a retired minister, and, in case of failure to do so, the Annual Conference may locate them without their consent. They shall have no claim on the conference funds except by vote of the conference. They shall not be eligible for membership on conference committees, commissions, or boards. They shall not receive pension credit and shall not be eligible to receive pension payments while in this relation.

Section XV. Superannuated Ministers.

¶ 359. Superannuated ministers are those who, at their own re-

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[16] *See* Judicial Council Decision 305.

and the College of Bishops involved. The bishop shall continue to receive the regular stipend.

¶ 387. A bishop who has served for not less than two quadrenniums may be granted a sabbatical leave for not more than one year for a justifiable reason other than health if the request is made and if that bishop's College of Bishops, the Committee on Episcopacy of that jurisdiction, and the Council of Bishops or its executive committee approve. In this event the bishop shall, for the period for which the leave is granted, be released from the presidential responsibilities within the episcopal area, and another bishop or bishops, active or retired and not necessarily from the same jurisdiction, shall be designated by the Council of Bishops, on recommendation of the College of Bishops of the jurisdiction involved, to assume the presidential duties during the interim. The bishop shall continue to receive housing allowance and one-half salary for the period of the leave.

¶ 388. The Council of Bishops shall promote the evangelistic activities of the Church and shall furnish such inspirational leadership as the need and opportunity may demand.

¶ 389. The Council of Bishops, with the cooperation of the Division of the Ordained Ministry, may plan for annual regional seminars for the orientation and instruction of ministers newly appointed to the district superintendency.

¶ 390. *Duties, Powers, and Limitations of Bishops.*—The duties of a bishop are:

1. To oversee the spiritual and temporal affairs of the Church.

2. To preside in the General, Jurisdictional, Central, and Annual Conferences.

3. To form the districts after consultation with the district superintendents and after the number of the same has been determined by vote of the Annual Conference.

4. To fix the appointments of the preachers in the Annual Conferences, Provisional Annual Conferences, and Missions, as the Discipline may direct. The bishop may appoint an associate pastor for a charge when such an appointment is judged necessary.

5. To read the appointments of deaconesses.

6. To fix, either within their own conference or within the con-

ference where they attend school, the Charge Conference membership of all ministers who are appointed to attend school.

7. To transfer, with the consent of the bishop or bishops involved, ministerial members of one Annual Conference to another, *provided* the ministerial members and the Annual Conferences agree to said transfer; and to send immediately to the secretaries of both conferences involved, to the conference Boards of the Ministry, and to the clearinghouse of the General Board of Pensions, written notices of the transfer of members and of their standing in the course of study if they are undergraduates.[22]

8. To organize such Missions as shall have been authorized by the General Conference.

9. To consecrate bishops, to ordain elders and deacons, to consecrate deaconesses, and to see that the names of the persons ordained and consecrated be entered on the journals of the conference and that proper credentials be furnished to these persons.

10. To travel through the connection at large. (*See* ¶ 861.)

¶ 391. The following provisions and limitations shall be observed by the bishop when fixing the appointments:

1. The bishop shall appoint preachers to pastoral charges annually after consultation with the district superintendents; the bishop shall provide for consultation with the Pastor-Parish Relations committee or its representative; *provided* that, before the official declaration of the assignments of the preachers, the appointments shall be announced openly to the Cabinet, and *provided* further that before any announcement of appointments is made, the district superintendents shall consult with the pastors and the local Pastor-Parish Relations committees or their chairpersons concerning their specific appointments except when the pastors involved have left the seat of the Annual Conference without the permission of the Annual Conference.[23] Bearing in mind the stated goals of an inclusive Church, the bishop shall seek the cooperation of the Cabinet and congregations in the appointment of pastors without regard to race or color.

2. The bishop may make or change the appointments of preachers in the interval between sessions of the Annual Conference as necessity

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[22] *See* Judicial Council Decisions 114, 254.

[23] *See* Judicial Council Decision 101.

may require, after consultation with the district superintendents and they in turn consulting both the pastor and the Pastor-Parish Relations committee.

3. The bishop shall choose and appoint the district superintendents annually, but within the Jurisdictional Conferences of the United States no minister shall be appointed a district superintendent for more than six years in any consecutive nine years.

4. The years served by a district superintendent in a Methodist Annual Conference or by a conference superintendent in an Evangelical United Brethren Annual Conference immediately prior to union shall in the first appointment under The United Methodist Church be counted as part of the six-year maximum, except that in the case of a conference superintendent of The Evangelical United Brethren Church no more than a maximum of three years' service prior to the minister's coming to membership in an Annual Conference employing the appointive system shall be counted.

5. On the request in each case of an appropriate United Methdist official, agency, or institution, and after consultation with the district superintendents, the bishop may make appointments annually to positions in or through United Methodist and United Methodist-related agencies.[24]

6. On the request in each case of an appropriate official, judicatory, agency, or institution, and on the recommendation of the district superintendents, confirmed by a two-thirds vote of the Annual Conference, the bishop may make appointments annually to positions in non-United Methodist Churches or agencies; *provided* that in no such case shall The United Methodist Church incur any financial responsibility.[25]

7. On the recommendation of the conference Board of Discipleship (if any; *see* ¶¶ 1029-30), confirmed by a two-thirds vote of the Annual Conference, the bishop may appoint an effective member of the conference as conference evangelist; *provided* that the appointee shall meet the standards set by the General Board of Discipleship and conference Board of Discipleship for conference evangelists.

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[24] *See* Judicial Council Decisions 166, 167.

[25] *See* Judicial Council Decisions 321, 325, 329.

8. The bishop may appoint a member of an Annual Conference who desires to attend school to any college or school of theology accredited or approved by the University Senate.

9. The bishop shall not appoint any preacher who has been rejected as an applicant or who has been discontinued or located, except at the preacher's own request, unless the conference at the time of such rejection, discontinuance, or location shall give such liberty; the bishop shall not appoint as supply pastors any preachers who have previously been expelled from the ministry or who have surrendered their credentials to an Annual Conference unless the conference to which they surrendered their credentials or from which they were expelled restores the credentials or recommends it.

10. Every traveling preacher, unless retired, supernumerary, on sabbatical leave, on disability leave, or under arrest of character, must receive an appointment.

¶ 392. Appointees to such appointments as referred to in ¶ 352.7 may neither be required to accept nor are they guaranteed appointment, and may be returned to a regular appointment only by agreement of the bishop and Cabinet.

¶ 393. When a bishop judges it necessary, a circuit, station, or mission may be divided into two or more charges and the pastors appointed thereto; and two or more circuits or stations may be united and one pastor appointed for the united congregations

¶ 394. Bishops shall discharge such other duties as the Discipline may direct.

¶ 395. *Retired Bishops.*—1. If a bishop cease from traveling at large among the people without the consent of the Jurisdictional Conference, that bishop shall not thereafter exercise in any degree the episcopal office in The United Methodist Church.

2. A bishop may voluntarily resign from the episcopacy at any session of the Jurisdictional Conference. A bishop so resigning shall surrender consecration papers to the secretary of the Jurisdictional Conference and shall be furnished with a certificate of resignation which shall entitle the bishop to membership as a traveling elder in the Annual Conference in which membership was last held or its successor. When the bishop or surviving spouse and dependent children become conference claimants, the Episcopal Fund shall pay a pension

petition within fifteen days after such direction by the secretary of the Judicial Council. In like manner any interested party may, on the party's own motion, intervene and answer, plead, or interplead.

¶ 1516. The decisions of the Judicial Council of The Methodist Church, heretofore issued, shall have the same authority in The United Methodist Church as they had in The Methodist Church, persuasive as precedents except where their basis has been changed by the terms of the Plan of Union or other revisions of church law.

¶ 1517. The Judicial Council shall have other duties and powers as may be conferred upon it by the General Conference.

¶ 1518. All decisions of the Judicial Council shall be final. However, when the Judicial Council shall declare any act of the General Conference unconstitutional, that decision shall be reported back to that General Conference immediately.

¶ 1519. The decisions of the Judicial Council on questions of law, with a summary of the facts of the opinion, shall be filed with the secretary of the General Conference and shall be published in the following manner:

1. Within ninety days following each session of the Judicial Council, the digest of decisions of the Judicial Council shall be published in *The Interpreter* or its successor publication.

2. The decisions of the Judicial Council rendered during each year shall be published in the General Minutes.

Section II. Trials.

¶ 1520. Church trials are to be regarded as an expedient of last resort. Only after every reasonable effort has been made to correct any wrong and adjust any existing difficulty should steps be taken to institute a trial. No such trial as herein provided shall be construed to deprive the accused of his legal civil rights.

All trials should be conducted in a consistent Christian manner by a properly constituted court, after due investigation. The administration of oaths shall not be required.

¶ 1521. *Offenses.*—1. A bishop, ministerial member of an Annual Conference (¶ 315) or lay pastor (ordained or unordained) (¶ 307.3) shall be liable to accusation and trial upon any one or more of the following charges:

a) Immorality, crime, or other imprudent and unchristian conduct.

b) Habitual neglect of duties as a member or officer in the Church.

c) Disobedience to the order and discipline of The United Methodist Church.

d) Disseminating doctrines contrary to the established standards of doctrine of the Church.

e) Unministerial conduct or maladministration in office.

2. A lay member of the Church shall be liable to accusations and trial upon any one or more of the charges set forth in §§ *a, b, c,* and *d* above.

¶ 1522. *Limitations.*—No charge shall be entertained for any alleged offense which shall not have been committed within two years immediately preceding the filing of the complaint except where there is a conviction in a criminal court, and in such cases the charges shall not be entertained unless they are filed within one year after the entry of final judgment in that case.

¶ 1523. *Charges.*—1. A charge shall not allege more than one offense, several charges against the same person, however, with the specificiations under each of them, may be presented at one and the same time and may be tried together. When several charges are tried at the same time, a vote on each specification and charge must be separately taken.

2. Amendments may be made to a bill of charges at the discretion of the presiding officer; *provided* that they relate to the form of statement only and do not change the nature of the alleged offense and do not introduce new matter of which the accused has not had due notice.

3. Charges and specifications for all trials shall define the offense by its generic term as set forth in ¶ 1521 and shall state in substance the facts upon which said charges are based.

¶ 1524. *Counsel.*—1. In all cases an accused person shall be entitled to appear and be represented by counsel, a ministerial member of The United Methodist Church if the accused is a bishop or an elder and either a lay or ministerial member of the said Church if the of the Central Conference the bishop shall notify the secretary of the Central Conference in writing of the intention to appeal, unless such decision shall be rendered within thirty days prior to the meeting of such conference, in which case notice shall be given within ten days after the conviction.

3. It shall be the duty of the secretary of the Jurisdictional or the Central Conference, on receiving notice of such appeal, to notify the secretary of the Judicial Council, and the council shall fix the time and place for the hearing of the appeal and shall give due notice of the same to the appellant and to the secretary of the Jurisdictional or Central Conference, who in turn shall notify the counsel for the Church.

¶ 1531. *Appeal of a Ministerial Member of an Annual Conference.*—1. Each Jurisdictional Conference, upon nomination of the College of Bishops, shall elect a **Court of Appeals,** composed of nine itinerant elders, who have been at least six years successively members of The United Methodist Church or of one of the churches forming the union, and an equal number of alternates. This court shall serve until its successors have been confirmed. This court shall have full power to hear and determine appeals of ministerial members taken from any Annual Conference within the jurisdiction. The court shall elect its own president and secretary and shall adopt its own rules of procedure, and its decisions shall be final, except that an appeal may be taken to the Judicial Council upon questions of law. (*See* ¶ 1529.9.)

2. In case of conviction in a Trial Court a ministerial member shall have the right of appeal to the jurisdictional Court of Appeals as above constituted; *provided* that within thirty days after the conviction the ministerial member shall notify the president of the conference in writing of the intention to appeal.

3. When notice of an appeal has been given to the president of the Trial Court, the president shall give notice of the same to the secretary of the Court of Appeals of the Jurisdictional Conference and submit the documents in the case. The Jurisdictional Conference Court of Appeals shall give notice to the president of the conference from which the appeal is taken and to the appellant of the time and place where the appeal will be heard. Both the Annual Conference and the

appellant may be represented by counsel. The president of the conference shall appoint counsel for the Church.

4. The Court of Appeals of the Jurisdictional Conference when acting as a Court of Appeals shall determine two questions only:

a) Does the weight of the evidence sustain the charge or charges?

b) Were there such errors of law as to vitiate the verdict?

These questions shall be determined by the records of the trial and the argument of counsel for the Church and for the accused. The court shall in no case hear witnesses.

5. All necessary traveling and sustenance expense incurred by the Court of Appeals, the counsel for the Church, and the counsel for the defendant, in the hearing of an appeal case coming from an Annual Conference and appearing before any jurisdictional Court of Appeals, shall be paid out of the administration fund of the Jurisdictional Conference in which the proceedings arise.

¶ 1532. *Appeal of a Lay Pastor.*—1. In case of conviction a lay pastor shall be allowed to appeal to the Annual Conference; *provided* that within thirty days after conviction the lay pastor shall signify in writing to the superintendent of the district the determination to appeal.

2. An appeal by a lay pastor from a Charge Conference within the jurisdiction of a Mission shall be to the annual meeting of the said Mission.

¶ 1533. *Appeal of a Church Member.*—1. The Charge Conference of each charge shall elect from among the members of the Church a person of sound judgment and experience in the affairs of the Church as a trier of appeals for members.

2. Any member of the Church against whom judgment shall have been rendered by a Trial Court may appeal to the Court of Appeals, as hereinafter constituted, by giving written notice of appeal to the district superintendent within thirty days after judgment is rendered.

3. When thirty days' notice of appeal shall have been given, or sooner if agreed upon, the superintendent, having due regard for the wishes and rights of the appellant, shall convene a Court of Appeals. It shall be constituted of not fewer than seven nor more than nine triers of appeals in the district, but the trier of appeals of the charge to which the accused member belongs shall not be summoned. The

¶ 1537. When a lay pastor is deprived of credentials of ordination by expulsion or otherwise, the district superintendent shall require them and shall file them with the Annual Conference in the bounds of which the lay pastor resides.

¶ 1538. Should a lay pastor later produce to the Annual Conference a recommendation from the District or Charge Conference for the restoration of the surrendered credentials, signed by its president and secretary, they may be restored to the lay pastor.

¶ 1539. *Investigation and Trial of a Bishop.*—1. A bishop is amenable for conduct to the Jurisdictional or Central Conference in which that bishop has residential or presidential supervision, or to the Jurisdictional or Central Conference to which that bishop is related.

2. If a bishop shall be accused in writing of any of the offenses hereinbefore mentioned (¶ 1521) in the interval between sessions of the Jurisdictional Conference, the district superintendent within whose district the offense is said to have been committed shall call the Committee of Investigation of that Annual Conference, who shall carefully inquire into the case, and if in the judgment of the majority of them there is reasonable ground for such accusation, they shall prepare and sign the proper charges and specifications and send a copy of the same to the accused and to the president of the College of Bishops of the jurisdiction in which the offense took place. The said president shall call together at some convenient place, in not less than ten nor more than fifteen days from the time the charges are received, nine ministers in full connection of the said jurisdiction and also the witnesses by whom the accusation is expected to be proved. The said president or some other bishop of the jurisdiction appointed by the president shall preside at the investigation. If possible, the accused shall have the right to make a statement in self-defense and to interrogate witnesses, but shall not be allowed to present any. If six or more of these ministers in full connection determine that a trial is justified, they shall order one, and the College of Bishops may suspend the bishop pending trial as hereinafter provided.

3. In case a trial is ordered, the president of the College of Bishops of the said jurisdiction shall within seven days from the date on which a trial is ordered fix the time and place of it, which shall be in

not less than thirty nor more than sixty days from the date of such order. The Trial Court shall be constituted as follows:

a) The president of the College of Bishops shall arrange for a meeting of the accused bishop and counsel and the counsel for the Church as early as practicable after the trial is ordered to select the members of the Trial Court.

b) The president shall nominate as proposed members of the Trial Court thirteen ministerial members in full connection from a list made up of the Committees of Investigation of not fewer than four Annual Conferences within the jurisdiction.

c) The Church and the accused each shall have the right of peremptory challenge to the number of four and of unlimited challenge for cause.

d) For each name stricken from this list of thirteen through the exercise of the right of challenge, the president of the College of Bishops shall add another from the eligible group until the required number of thirteen is thus selected. If necessary to complete the panel, nominations may be made from other ministerial members in full connection in the jurisdiction.

e) By a continuation of this same process, four alternates shall be chosen, who shall be called in the order of their election to serve.

f) Should the accused be the president of the College of Bishops of the jurisdiction, then a copy of such charges and specifications shall be sent to the secretary of the College of Bishops of that jursidiction, who shall perform the duties hereinabove prescribed for the president or designate another bishop of the same jurisdiction.

4. The court as thus constituted shall have full power to try the accused and by a vote of nine or more to suspend the accused from the exercise of the functions of office, to depose the accused from office or the ministry or both, to expel the accused from the Church, or in case of minor offenses to fix a lesser penalty. Its findings shall be final, subject to appeal to the Judicial Council as hereinafter provided, and shall be reported to the Jurisdictional Conference for entry on its journal. The records of the trial, including the testimony, shall be signed by the president and secretary of the Trial Court and shall be placed in the custody of the secretary of the Jurisdictional Con-

ference, together with all the documents in the case, for preservation with the papers of the Jurisdictional Conference, and shall be the basis of any appeal which may be taken.

5. An accusation preferred during the session of a Jurisdictional Conference shall be made directly to the Committee on Episcopacy, which shall investigate the charge and if it considers a trial necessary, shall report to the Jurisdictional Conference. If the Committee on Episcopacy should decide a trial necessary, it shall formulate charges and specifications, conforming them to the grade of offense involved in the accusation, and it shall appoint one or more of its members to prosecute the case. The bill of charges and specifications shall be a part of the report of the committee to the Jurisdictional Conference.

6. Every case to be tried under the process stated in § 5 above shall be referred to a Trial Court, which shall consist of thirteen ministerial members in full connection and a presiding officer, all of whom shall be appointed by the president in the chair or in such manner as the conference may determined. The Church and the accused each shall have, in addition to the right of unlimited challenge for cause, the right of peremptory challenge to the number of four. The court as thus constituted shall have full power to try the accused and by a two-thirds vote to suspend the accused from office, to depose the accused from office or the ministry or both, to expel the accused from the Church, or in the case of minor offenses to fix a lesser penalty. The court's findings shall be final, subject to appeal to the Judicial Council as hereinafter provided.

7. A bishop suspended or deposed shall have no claim upon the Episcopal Fund for salary, dwelling, or any other expenses from the date of such suspension or deposition, but in case this person is thereafter found not guilty of the charge or charges for which suspended or deposed, the bishop's claim upon the Episcopal Fund for the period during which deprived of the functions of office shall be paid.

8. If an alleged offense has been committed beyond the bounds of any district, the district superintendent within the bounds of whose district the bishop resides shall proceed as hereinbefore provided.

9. The several Central Conferences shall make suitable rules for the investigation and trial of charges against bishops elected by them.

In the absence of such rules, the same procedure shall be followed as is provided for the investigation and trial of bishops in Jurisdictional Conferences; *provided,* however, that an appeal may be taken to the Judicial Council. If an accused bishop is the only bishop in a Central Conference, the Council of Bishops shall designate one of their number to conduct the trial.

¶ 1540. *Trial of a Ministerial Member of an Annual Conference.*—1. Each Annual Conference at each session, upon nomination of the presiding bishop, shall elect five itinerant elders, persons of experience and sound judgment in the affairs of the Church, who shall be known as the **Committee of Investigation,** and five reserves chosen in like manner to serve in the absence or disqualification of the principals.

2. If a ministerial member of an Annual Conference, whether on probation or in full connection, in the interval between sessions of the conference, shall be accused of any of the offenses enumerated in ¶ 1521, the member's district superintendent (or the district superintendent of the district within the bounds of which such acts are alleged to have taken place) shall call the Committee of Investigation to inquire into the same and, if possible, bring the accused and accuser face to face. The accused shall have the right to make a statement in self-defense but shall not present any witnesses before the Committee of Investigation. The district superintendent of the accused (or such other district superintendent as shall be appointed) shall preside throughout the proceedings and shall certify the judgment of the committee to the Annual Conference.

3. If the accused is a district superintendent, the bishop in charge shall call in the superintendent of any other district who shall summon the Committee of Investigation of the Annual Conference of which the accused is a member to investigate the case, and that superintendent shall preside at the investigation.

4. If in the judgment of a majority of the Committee of Investigation there is reasonable ground for such accusation, they shall prepare and sign the proper charges and specifications and send a copy to the accused, to the bishop in charge, to the district superintendent duly appointed by the bishop in charge, and to the secretary of the Annual Conference. On recommendation of the Committee of Investi-

gation, the bishop may suspend the accused from all ministerial services pending the trial.[8]

5. The bishop in charge, or the district superintendent duly appointed by the bishop in charge, within ten days after receipt of a copy of such charges, shall appoint counsel for the Church and notify the accused in writing to appear at a fixed time and place no less than seven days after service of such notice and within a reasonable time thereafter to select the members of the Trial Court. At the appointed time, in the presence of the accused and counsel of the accused, if requested, and counsel for the Church, thirteen elders in full connection shall be selected as a **Trial Court.** They shall be selected from a panel of twenty-one elders in full connection of the Annual Conference of which the accused is a member, who have been nominated by the majority of the district superintendents of that conference. The counsel for the Church and the accused shall each have peremptory challenges to the number of four and challenges for cause without limit. If by reason of challenges for cause being sustained the number is reduced below thirteen, additional elders shall be nominated, in like manner as was the original panel, to take the places of the numbers challenged, who likewise shall be subject to challenge for cause. This method of procedure shall be followed until a Trial Court of thirteen members has been selected. The presiding officer in charge shall also fix the time and place for the trial, notice of which shall be given in writing to the accused by the counsel for the Church seven days in advance of the time fixed; *provided* that with the consent of the accused the time of the trial may be fixed at an earlier date. The bishop in charge shall either preside at the trial or invite another bishop or a district superintendent to do so. The presiding officer shall appoint a secretary, who shall keep a record of the proceedings and of the testimony. The court thus constituted shall have full power to try the accused and upon conviction by a vote of nine or more thereof shall have power to suspend the accused from the exercise of the functions of office, to depose the accused from office or the ministry or both, to expel the accused from the Church, or in case of conviction of minor offenses to fix a lesser penalty. Its findings shall be final,

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[8] *See* Judicial Council Decision 89.

subject to appeal to the Committee on Appeals of the Jurisdictional Conference or the Central Conference, as the case may be. It shall make a faithful report in writing of all its proceedings, signed by the president and secretary of the committee, to the secretary of the Annual Conference for permanent record, and deliver to that secretary therewith the bill of charges, the evidence taken, and the decision rendered, together with all documents brought into the trial.

6. When accusation against a ministerial member is preferred during the session of an Annual Conference, it shall be referred to the Annual Conference Committee of Investigation, which committee shall report to the conference whether or not a trial is deemed necessary. The Committee of Investigation, when reporting a case for trial, shall formulate a bill of charges and specifications. The presiding bishop shall appoint some elder in full connection with the conference as counsel for the Church.

7. The conference may constitute a Trial Court of thirteen elders in full connection to try the accused in the same manner as in § 5 above. The Trial Court, in the presence of a bishop or of a chairperson whom the president of the conference shall have appointed, and one of the secretaries of the conference, shall try the case. The Trial Court thus constituted shall have full power, upon conviction of the accused by two-thirds vote thereof, to expel the accused from the ministry and membership of the Church, to depose the accused from the ministry of the Church, to suspend the accused from his office in the ministry, or in connection with a minor offense to fix a lesser penalty. Its findings shall be final, subject to appeal to the Committee on Appeals of the Jurisdictional Conference. It shall make a faithful report in writing of all its proceedings, duly signed by the president and secretary of the Trail Court, to the secretary of the Annual Conference for entry in its journal, and deliver therewith the bill of charges and specifications, the evidence taken, and the decision rendered, with all documents brought into the trial.

8. Any ministerial member residing beyond the bounds of the conference in which membership is held shall be subject to the investigation prescribed in §§ 1-5 above under the authority of the superintendent of the district within which the minister resides or is employed. The Committee of Investigation shall consist of the Committee

of Investigation of that conference. If residing or employed within the bounds of a Mission, the minister shall be subject to investigation under the authority of the superintendent of the district within which Charge Conference membership is held or of the superintendent of the Mission and the Committee of Investigation of the same. If the minister is the superintendent of the Mission, the bishop in charge shall appoint an elder in full connection to act in the case.

9. An Annual Conference may entertain and try charges against its ministerial members though no investigation of them has been held or though the investigation has not resulted in suspension.

10. In all the foregoing cases the papers, including the record, charges, evidence, and findings, shall be transmitted to the ensuing session of the Annual Conference of which the accused is a member; on which papers, and on such other evidence as may be admitted, and also upon such other charges or specifications as may be presented, due notice of the same having been given to the accused, the case shall be determined.

11. Any ministerial member who shall hold a religious service within the bounds of a pastoral charge other than that to which appointed when requested by the preacher in charge or the district superintendent not to hold such service shall be deemed guilty of disobedience to the order and discipline of the Church, and if that minister shall not refrain from such conduct, shall then be liable to investigation and trial.

12. If a ministerial member is charged with disseminating publicly or privately doctrines which are contrary to the established standards of doctrine of the Church, and the minister so offending shall solemnly promise the Committee of Investigation not to disseminate such erroneous doctrines in public or private, it may waive suspension in order that the case may be laid before the next Annual Conference, which shall determine the matter.

¶ 1541. *Withdrawal Under Complaints or Charges.*—When a bishop or a ministerial member is accused of an offense under ¶ 1521 and desires to withdraw from the Church, the Jurisdictional or Central Conference in the case of a bishop, or the Annual Conference in the case of a ministerial member, may permit withdrawal; in which case the record shall be "Withdrawn under complaints." If formal charges

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. **SUPERIOR COURT**
CA No. 114902

William E. Alberts, Plaintiff)
) Memorandum of Decision on
v) Motions for Summary
) Judgment
Donald Devine, ET AL, Defendants)

The defendants, Edward G. Carroll and John E. Barclay, respectively filed Motions for Summary Judgment in the aforesaid matter. The matters of law in respect to both motions are dealt with in this memorandum.

Mass. R. Civ. P. 56(c) provides that the court may allow a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In order to prevail, the moving party bears the burden of establishing that there is no genuine question of fact on every relevant issue raised by the pleadings. *Attorney General* v *Baily,* 386 Mass. 367, 371 (1982); *Kesler* v *Pritchard*, 362 Mass. 132, 134 (1972); *Hub Associates, Inc.* v *Goode,* 357 Mass. 449, 451 (1970).

In short summary, the plaintiff alleges in his complaint that defendants Barclay and Carroll induced the defendant Devine to breach plaintiff's trust and disclose to them his psychological diagnosis, condition, behavior or treatment. The complaint further alleges that defendants Barclay and Carroll conveyed "their opinions of plaintiff's mental health" to members of the Southern New England Conference and various boards, committees and subcommittees of the Conference concerned with the appointment of ministers, as well to members of the public. As a result of defendants' disclosures, plaintiff claims that he was not reappointed as the Minister to the Old West Church, thereby causing him to sustain economic loss.

After a full review of the affidavits[1] and other relevant documents submitted by the parties, the court finds that there is no genuine issue of material fact. Defendant Barclay admits that he consulted with defendant Devine "for guidance as how best to assist the plaintiff in his private and church life." He also admits that he advised defendant Carroll, who presided over the Board of Ministry at the Annual Conference, of plaintiff's status. The Board of Ministry subsequently voted to retire plaintiff from the ministry.

The issue that the plaintiff attempts to assert relative to the conduct of defendants Barclay and Carroll is whether the information disclosed by defendant Devine was used in such a manner so as to wrongfully deprive him of his ministry post. On its face, this issue appears to be one of fact. In the context of a church dispute, however, the threshold issue is whether judicial inquiry into the factual question raised by the plaintiff is foreclosed by the First and Fourteenth Amendments. This threshold matter raises an issue of law and is therefore appropriately a matter for summary judgment. *Attorney General* v *Bailey,* 386 Mass. 367 (1982); *Commonwealth* v *Colonial Motor Sales, Inc.*, (1981) Mass. App. Ct. Adv. Sh. 937.

When presented with a motion for summary judgment in a case involving a church dispute, the court must address the following three issues: whether the United Methodist Church is hierarchical, whether the church maintains a tribunal for the resolution of controversies of this nature, and whether the plaintiff asserts his claim as a member of that church. *Wheeler* v *Roman Catholic Archdiocese of Boston,* 378 Mass. 58, 62 (1979) cert. den. 444 U.S. 899 (1979). These three issues are factual in nature and, in this case, they are undisputed.

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[1] The affidavits of plaintiff (second affidavit) and Bishop Joseph E. Yeakel were not signed by the respective affiants. While the court could disregard such affidavits, *Danis* v *Bridge Enterprises, Inc.*, 8 Mass. App. Ct. 930, 931 (1979), there has been no objection to the admission of these affidavits by either party on this ground. Therefore, the court has considered them insofar as they are relevant to resolution of this dispute.

A hierarchial church is one in which "the religious congregation or ecclesiastical body. . . is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control, more or less complete, in some supreme judicatory over the whole membership of that general organization." *Watson* v *Jones,* 13 Wall. 679, 722-723 (1871). The term 'hierarchical' is used in contradistinction to 'congregational' which has been defined as a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations and, so far as church government is concerned, owes no fealty or obligation to any higher authority." *Id.*

The United Methodist Church falls within the former category. It is a hierarchical church which, in ascending order, is composed of local churches, regional districts and various levels of conferences. The highest ecclesiastical body of the church is the General Conference vested by the church Constitution with "full legislative power over all matters distinctively connectional," including but not limited to the power to define and fix the conditions, privileges, and duties of church membership; define and fix the powers and duties of Annual Conferences, Provisional Annual Conferences, Missionary Conferences and Missions, and of Central Conferences, District Conferences, Charge Conferences, and Congregational Meetings; and provide a judicial system and method of judicial procedure for the church. The basic body of the church is the Annual Conference, responsible for "all matters relating to the character and conference relations of its ministerial members." There is also a Judicial Council which may hear and determine appeals from a bishop's decision on a question of law made during the course of the Annual Conference.

The United Methodist Church also maintains a tribunal for resolution of disputes such as that presented here. According to the church's Book of Discipline, a bishop may be subject to a church trial upon a written charge of "imprudent and unchristian conduct", disobedience to the order and discipline of the church or unministerial conduct. Under the circumstances, the plaintiff had the option of pursuing a church trial if he believed that the conduct of the defendant Carroll was improper and that the improper conduct of the defendant caused him to be retired by a vote of the Board of Ministry at the Annual Conference.

Finally, plaintiff's claim is not founded upon his membership in the church. His claim for damages, however, assumes that he was entitled to be a minister in the church and that, but for defendants' alleged tortious conduct, he would have remained in that post. The relief requested is therefore predicated on his membership or lack of membership in this church.

The role of a civil court in resolving church disputes may vary, depending upon the structure of the church involved, *Antioch Temple, Inc.* v *Parekh,* Mass. Adv. Sh. (1981) 1523, 1529, as well as the nature of the dispute. Compare *Jones* v *Wolf,* 433 U.S. 595 (1979) and *Serbian Eastern Orthodox Diocese for the United States and Canada* v *Milivojevich*, 425 U.S. 696 (1976). It is uncontroverted that the church is a hierarchical organization rather than congregational. The court must now turn to the nature of the dispute in order to determine whether judicial scrutiny of defendants' actions is appropriate in this case.

Controversy concerning real property and doctrinal differences trigger most church disputes. In the former case, a state is constitutionally entitled to adopt a "neutral principles of law" analysis involving consideration of the deeds, state statutes governing the holding of church property, the local church's charter and the general church's constitution. *Jones* v *Wolf,* 443 U.S. at 602-603. See also *Maryland and Virginia Eldership of the Churches of God* v *Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970). In the latter case, however, the Constitution mandates that civil courts accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, ecclesiastical law, custom or rule. *Serbian Eastern Orthodox Diocese for the United States and Canada* v *Milivojevich*, 426 U.S. at 713. These matters are "strictly and purely ecclesiastical in...character," ***Watson*** v ***Jones,*** 13 Wall. at 733, and it is beyond the competence and jurisdiction of civil courts to inquire into these areas. ***Id.*** at 729. But see ***Wheeler*** v ***Roman Catholic Archdiocese of Boston***, 378 Mass. at 62 n. 3. As the court noted in ***Moustakis*** v ***Hellenic Orthodox Society of Salem and Peabody,*** 261 Mass. 426 (1928),

> (R)eligious freedom is the constitutional right of all citizens under our government; and..., if the courts deal with litigation of that nature, the whole subject of doctrinal theology, the customs, canonical laws both written and unwritten, and the fundamental organization of the various religious denominations would need to be determined with care for the purpose of reaching authoritative conclusions. Such a course by the courts would in the end deprive the denominations themselves of interpretations of their own body of church polity, and would establish the courts as the final arbiter in every religious controversy. The evils attendant upon such a practice have been thought far to outweigh the incidental advantages that might flow from its adoption.

Id. at 466.

The appointment of a minister is a canonical act and, as such, it is purely ecclesiastical. ***Gonzalez*** v ***Roman Catholic Archbishop of Manila***, 280 U.S. 1, 16 (1929). The retirement of a minister is likewise ecclesiastical, whether the retirement occurs as a matter of discipline or of faith. Although the plaintiff has clothed the actions of the defendants Barclay and Carroll in tort, see ***Moustakis*** v ***Hellenic Orthodox Society of Salem and Peabody,*** 262 Mass. at 465, his damage flows primarily from his retirement from the ministry. "It is not the province of civil courts to enter the domain of religious denominations for the purpose of deciding controversies touching matters exclusively ecclesiastical." ***Id.*** at 466. The plaintiff has not alleged "fraud, collusion or arbitrariness" in the Conference's decision to retire him from his post, see ***Gonzalez*** v ***Roman Catholic Archbishop of Manila***, 280 U.S. at 16, and even if he had, inquiry by a civil court into the circumstances of his removal may still be prohibited. ***Serbian Eastern Orthodox Diocese for the United States and Canada*** v ***Milivojevich***, 426 U.S. at 713.

The First and Fourteenth Amendments to the Constitution allow hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. *Id.* at 724. All who unite themselves to such an organization are bound to submit to the organization's chosen form of government. ***Watson*** v ***Jones,*** 13 Wall. at 729. The plaintiff became a minister in the United Methodist Church by choice and after undergoing the screening process as provided in the church's Book of Discipline, the plaintiff was ordained, thereby submitting himself to the doctrines, rules and authority of the church in matters involving faith, doctrine and internal organization which are insulated from judicial inquiry. The relationship of the plaintiff as an ordained minister and the governing body of the United Methodist Church cannot be analogized to an employer-employee relationship.

Whether the actions of the defendants Barclay and Carroll were improper or outside of the ambit of the governing Book of Discipline is properly the inquiry of the church tribunal and not that of a civil court. The same reasoning applies to the position as to whether or not the actions of the defendants Barclay and Carroll were justified. There exists no colorable clergy privilege in civil law to protect the actions of the defendants Barclay and Carroll. If a privilege, right or justification exists, its genesis is within the canonical framework of the doctrines of the church. In order to determine whether the defendants had such a justification due to their respective positions within the governing body of the church, a civil court would be required to interpret and apply the governing Book of Discipline and to rule upon the defendants' use or misuse of such justification. Interpretation and application of church law is insulated from the judicial inquiry of a civil court.

Even assuming, arguendo, that the plaintiff was able to establish that the actions of the defendants Barclay and Carroll constituted a 'secular tort' to the degree that liability attached, this court cannot disturb the decision to retire the plaintiff made by members of the United Methodist Church at its Annual Conference. The causal nexus of liability to damages in the form of nonappointment and retirement could not be established. The causal nexus between the allegedly tortious conduct and the harm sustained is broken.

Based upon the foregoing, the motion of Edward G. Carroll and the motion of John E. Barclay for summary judgment be and hereby are *allowed.*

By the Court,

Elizabeth J. Dolan
Associate Justice
Superior Court

Dated:______________________________

It is further Ordered that the Motion of defendant, John E. Barclay, for Entry of Final Judgment pursuant to Mass. R. Civ. P. 54(b) and the Motion of defendant, Edward G. Carroll, for Entry of Final Judgment pursuant to Mass. R. Civ. P. 54(b) be and hereby are *Allowed.*

Elizabeth J. Dolan

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 114902

WILLIAM E. ALBERTS,
PLAINTIFF

V.

DONALD T. DEVINE, ET AL,
DEFENDANTS

MOTION FOR PROTECTIVE ORDER

Defendants Carroll and Barclay hereby move the Court for a protective order protecting them from infringement upon their First Amendment rights as members of the United Methodist Church, and particularly in their roles as Bishop and District Superintendent respectively of the United Methodist Church, by:

1. Quashing any subpoena which may issue against or be served upon them in connection with a trial in this case;

2. Quashing any subpoena which may issue against or be served upon any other person who was a member of the United Methodist Church in 1972 or 1973;

3. Ordering that no testimony heretofore given by either of them by deposition and no documents heretofore identified or produced by either of them at deposition or in discovery in this case be disclosed hereafter except to counsel and their respective clients, and that no further portions of such testimony or documents shall become part of the record in this case, whether by offer or introduction at trial or by filing with the clerk or Court;

4. Ordering that no testimony given heretofore by Reverend Sam Hedrick or Reverend Oliver Drake (retired) of the United Methodist Church in deposition in this case and no documents identified or produced by either of them at deposition in this case be disclosed hereafter except to counsel and their respective clients, and that no further portions of such testimony or documents shall become part of the record in this case, whether by offer or introduction at trial or by filing with the clerk or Court;

5. Ruling inadmissible at trial any evidence relating in any way to the conduct, words and thoughts of defendants Barclay and Carroll and of any other members of the United Methodist Church in 1972 or 1973.

As grounds for this Motion, the Defendants refer the Court to their Memoranda in support of their Motions for Summary Judgment insofar as they relate to a constitutional prohibition of inquiry by the civil courts into matters of church doctrine and administration.

Defendants,

Edward G. Carroll and
John E. Barclay

By Their Attorneys,

Deborah S. Griffin
PEABODY & ARNOLD
One Beacon Street
Boston, Mass. 02108
(617) 523-2100

CONTRACT

NORFOLK COUNTY
SUPERIOR COURT
CIVIL DOCKET
LAW AND EQUITY **Docket No. 114902**

WILLIAM E. ALBERTS *vs.* **DONALD T. DEVINE ETALS**

Ad Damnun $ ___________ Date of Writ ___________

DOCKET ENTRIES

Counsel for Plaintiff	Counsel for Defendant
1975 Mar. 4 Keary, O'Laughlin, Olmstead and Hageman 1560 A. Tremont St. Box 782 Boston 1982 Aug. 24 Robert J. Doyle, Doyle, Playter, Novick & Berkin 1983 Apr. 7 9 Hamilton Place, Boston	1975 April 7 Jared H. Adams 50 Staniford Street Boston 02114 1976 Jan. 9 w/d/ 12/23/76 Reverend Bishop Edward Carroll Reverend John E. Barclay Csaplar and Bok One Winthrop Square
	1976 Jan. 29 Deborah S. Griffin Peabody and Arnold One Beacon Street Boston 1982 Oct. 25 Florence E. Freeman Freeman and Conceison 483 Boston Post Road Weston, Massachusetts

1.	1975 Mar. 4	Action entered Complaint Filed
	1975 Mar. 4	Plaintiffs Jury Claim
2.	1975 Mar. 26	Return of Service
3.	1975 Mar. 27	Request for Default
4.	1975 Mar. 27	Affidavit In Support of Request for Default—Defendant Defaulted
5.	1975 Apr. 7	Defendants' Motion to Remove Default and to Appear and Answer Late
6.	1975 May 23	Notice of Taking Deposition
7.	1975 May 23	Notice of Taking Deposition
8.	1975 May 23	Plaintiff's Motion for Leave to Make a Video Tape Recording of Deposition Testimony
9.	1975 May 27	Return of Service (Rev. Bishop Edward G. Carroll)

DOCKET ENTRIES

10.	1975 May 27	Return of Service (Rev. Dr. Sam Hedrick)
	1975 May 29	Motion to Take Video-Tape Deposition—Denied w/out Prejudice to Renewal if Bishop Carroll's Transfer is Imminent (Lynch, J.) (ns. 5/30/75)
11.	1975 Dec. 3	Plaintiff's Motion to Amend Complaint and add parties Defendants Edward Carroll and John Barclay
	1975 Dec. 8	Re: Above Motion—Allowed (Dimond, J.) Amendment is Part of Motion (Ns.)
12.	1975 Dec. 30	Return of Service (John Barclay)
13.	1976 Jan. 9	Motion to Extend time for Rev. Barclay and Bishop Carroll to Answer Amended Complaint up to and Including 1/14/76 (Assented)—Allowed (Dimond, J.) (ns. 1-9-16)
14.	1976 Jan. 16	Motion to Extend Time for Defendants Rev. Barclay and Rev. Bishop Carroll to Answer Amended Complaint to and Including 1/28/76
15.	1976 Jan. 29	Answer of Defendant and Jury Claim Edward G. Carroll and J. E. Barclay
16.	1981 Nov. 5	Notice of Taking Deposition
17.	1981 Nov. 23	Notice of Taking Deposition
18.	1981 Dec. 1	Plaintiff's Motion to Compel Discovery and for Protective Order
19.	1981 Dec. 9	Conciliator's Report
20.	1982 Feb. 8	Plaintiff's Motion for Evidentiary Hearing Re: Discovery, Order Compelling Discovery and Sanctions Under M.R.C,P Rule 37
21.	1982 Feb. 10	Defendants' Response to Request for Production of Documents
	1982 Feb. 16	Re: Plaintiff's Motion for Evidentiary Hearing Re: Discovery, Order Compelling Discovery and Sanctions R. 37—Denied w/out prejudice (Meyer, J.) (ns.)
22.	1982 Feb. 16	Plaintiff's Motion for Reconsideration and for Short Order of Notice
23.	1982 Feb. 18	Plaintiff's Motion for Evidentiary Hearing Re: Discovery Order Compelling Discovery and Sanctions
24.	1982 Feb. 19	Defendants' Motion for Award of Expenses R. 37

DOCKET ENTRIES

25.	1982 Feb. 24	Defendant Donald F. Devine's Motion for a Protective Order
26.	1982 Feb. 25	Notice of Taking Deposition
27.	1982 Mar. 4	Affidavit of Bishop G. Carroll
28.	1982 Mar. 4	Affidavit In Support of Motion for Award Expenses
29.	1982 Mar. 4	Affidavit of J. Warren Jacobs
30.	1982 Mar. 4	Affidavit of Rev. John E. Barclay
	1982 Mar. 4	Re: Defendant's Motion for Award of Expenses Under R. 37 (Barclay and Carroll)—Motion Denied (Sullivan, J.) (ns.)
	1982 Mar. 4	Plaintiff's Motion for Evidentiary Hearing Re: Discovery, Order Compelling Discovery and Sanctions under M.R.C.P 37—Motion Denied (Sullivan, J.) (ns.)
	1982 Mar. 4	Re: Defendant's Donald T. Devine's Motion for a Protective Order—Motion Allowed to the Extent that Deposition of Defendant Devine by Plaintiff shall Continue one more day on Direct Examination from 10 A.M. to 4 P.M. (w/breaks and lunch) (Sullivan, J.) (ns.)
31.	1982 Apr. 12	Defendant's D. T. Devine's Request for Request for Production of Documents under Rule 34
32.	1982 May 16	Plaintiff's Objection to Defendant D.T. Devine's Request for Production of Documents under Rule 34
33.	1982 Jun. 18	Defendant's Motion to Compel Production of Documents
	1982 Jul. 1	Re: Above Motion—Motion Denied (Dimond, J.) (ns.)
34.	1982 Sep. 9	Notice of Taking Deposition
35.	1982 Sep. 9	Plaintiff's Motion for Continuance of Trial to November Trial List
36.	1982 Sep. 15	Opposition of Defendant D. T. Devine's Motion for Continuance
	1982 Sep. 15	Plaintiff's Motion for Continuance of Trial to November List—Allowed 1st Case out in November—Parties need not appear to answer list on 9/23/82 (Rutledge, J.) (ns.)

DOCKET ENTRIES

37.	1982 Sep. 20	Notice of Taking Deposition
38.	1982 Oct. 1	Notice of Taking Deposition
39.	1982 Oct. 26	Defendant's John E. Barclay's Motion for Summary Judgment
40.	1982 Oct. 26	Affidavit of J. Barclay
41.	1982 Oct. 26	Notice of Taking Deposition
42.	1982 Oct. 27	Plaintiff's Motion to Compel Answer to Deposition Questions
43.	1982 Oct. 28	Plaintiff's Motion for Continuance of Trial
44.	1982 Nov. 1	Memorandum In Support of Defendant's Motion for Summary Judgment
45.	1982 Dec. 2	Notice of Taking Deposition
46.	1982 Dec. 23	Order Re: Special Assignment (Lynch, J.) (cs.)
47.	1982 Dec. 29	Order on Request for Special Assignment (Standing Order # 14-80) (Dolan, J.) Dated 12-21-82
48.	1983 Jan. 11	Notice of Taking Deposition
49.	1983 Jan. 13	Plaintiff's Motion to Compel Answer to Deposition Questions and for Attorney's Fees w/supporting Memo.
50.	1983 Jan. 13	Affidavit In Support of Motion
51.	1983 Jan. 13	Plaintiff's Motion for Order Compelling Defendant Carroll to Answer Deposition question and for Attorney's Fees, w/Memorandum
52.	1983 Jan. 20	Plaintiff's Motion For Order Compelling Production of Documents Pursuant to Deposition Subpoena
53.	1983 Jan. 21	Defendants' Motion to Amend Answer
54.	1983 Jan. 21	Defendants E. G. Carroll's Motion for Summary Judgment
55.	1983 Jan. 31	William E. Albert's Affidavit in Opposition to Defendant Barclay's Motion for Summary Judgment
56.	1983 Feb. 7	Defendants Barclay and Carroll's Motion to Strike Affidavit of W. E. Alberts
57.	1983 Feb. 11	Defendant Donald T. Devine's Motion to Amend Answer

DOCKET ENTRIES

58. 1983 Feb. 14	Plaintiff's Motion for Leave to Amend Complaint
59. 1983 Feb. 14	William E. Alberts' Second Affidavit In Opposition to Barclay's Motion for Summary Judgment
60. 1983 Feb. 15	Memorandum In Support of Defendant's Motion for Summary Judgment
61. 1983 Feb. 14	Defendants Carroll and Barclay's Motion in Limine
62. 1983 Feb. 16	Affidavit of Bishop Joseph H. Yeakel In Support of Motion for Summary Judgment
63. 1983 Feb. 23	Third Affidavit of William E. Albert's In Opposition to Motion for Summary Judgment
64. 1983 Feb. 25	Defendants' Motion for Entry of Final Judgment (54b)
65. 1983 Feb. 25	Plaintiff's Amended Motion to Amend Complaint
66. 1983 Mar. 4	Plaintiff's Motion In Limine, or Alternatively for a Report to Appeal Court or Supreme Judicial Court
67. 1983 Mar. 8	Defendant's Motion to Dismiss (Donald Devine)
68. 1983 Mar. 8	Defendant's Memorandum In Support
69. 1983 Mar. 8	Defendant's D. Devine's Motion for Summary Judgment
70. 1983 Mar. 8	Defendant's Memorandum In Support
71. 1983 Nov. 22	Defendant's Motion for Protective Order—Allwed Pending Report of Issues of Law (Dolan, J.) dated 11-15-83 (ns. 11-22-83)
72. 1983 Nov. 22	Memorandum of Decision on Motion of Defendant Devine for Summary Judgment (Dolan, J.) dated 11-15-83 (cs. 11-15-83)
73. 1983 Nov. 22	Memorandum of Decision on Defendant's Motion (Devine's) to Dismiss (Dolan, J.) dated 11-15-83 (cs. 11-15-83)
74. 1983 Nov. 22	Memorandum of Decision on Plaintiff's Motion for leave to amend complaint (Dolan, J.) dated 11-15-83 (cs. 11-15-83
75. 1983 Nov. 22	Memorandum of Decision on Motion for Summary Judgment (Dolan, J.) dated 11-15-83 (cs. 11-15-83)

DOCKET ENTRIES

76. 1983 Nov. 22	Judgment of Dismissal (54b) Re: Defendants' Bishop Edward G. Carroll, J. Barclay w/costs (Dolan, J.) dated 11/15/83 (cs 11-15-83)
77. 1983 Nov. 22	Report (Dolan, J.) dated 11-15-83 (cs. 11-15-83)
78. 1983 Nov. 22	Memorandum on Status of parties and causes of action for report (Dolan, J.) (cs. 11-15-83)
79. 1983 Nov. 23	Notice of Service of Notice of the Report filed by Judge Dolan (cs.) Robert Doyle, Playter, Novick and Berkin sqs., 100 Boylston Street, Boston, Mass., Florence Freeman Esq., Freeman and Conceison Esqs., 483 Boston Post Road, P. O. Box 647, Weston, Mass., Deborah S. Griffin Esq., Peabody and Arnold, One Beacon Street, Boston
80. 1983 Nov. 23	Defendant's Objection to Judge Dolan's Decision of November 22, 1983

A True Copy

Attest:
Assistant Clerk

APPENDIX I

Extract from Minutes of 1973 Annual Conference as appended to William E. Alberts' Third Affidavit in Oposition to Motion for Summary Judgment

• • •

Board of Ministry. Bishop Carroll read a communication he had directed to Oliver Drake, chairman of the Board of Ministry, outlining his reasons for finding the Reverend William Alberts unappointable.

Recommendation. Oliver Drake read the recommendation of the Board of Ministry that Dr. William Alberts be given retired relationship in accordance with paragraph 360 of the 1972 Discipline of the United Methodist Church.

Mr. Drake presented his personal statement concerning the Board of Ministry's rationale for the recommendation.

William Alberts was recognized and presented his statement regarding the above matters.

Point of Order. A point of order was raised concerning the length of the statement.

Extension of Time. It was moved and voted to extend the time for 10 minutes for the completion of the statement.

Bishop Carroll announced that voting on the recommendation of the Board of Ministry would be limited to ministers in full connection, per paragraph 660 (a) of the 1972 Discipline.

Call for the Question. After considerable discussion a motion was made to call for the question. Following several requests for personal privilege the motion was defeated.

Personal Privilege. Eva Young moved that the privilege of the floor be granted to Harry Freeman Jones. This was approved.

Substitute Motion. Wilber Zeigler moved to substitute for the Board of Ministry recommendation the following: "According to paragraph 1540.6 of the Discipline I hereby bring charges against Bill Alberts according to paragraph 1521(c) and ask that this be referred to the Conference Committee on Investigation for their considered action". This motion was ruled out of order by the Bishop.

Extension of Time. On motion of Paul Irwin the Conference extended the time to 5:45.

Call for the Question. A call for the previous question was sustained. Time was extended. A motion to recess was defeated. A motion to take a written ballot was also defeated.

The motion to retire William Alberts under paragraph 360 of the Discipline was approved by a show of hands. The following persons asked to be recorded as voting in opposition to the motion: William Alberts, Jonathan Almond, Jerry Cook, Richard Evans, Leonard Gibbs, Richard Harding, Edgar Helms, David Hollenbeck, T. Landon Lindsay, and Alan R. Wood.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. **SUPERIOR COURT**
DOCKET NUMBER 114902

WILLIAM E. ALBERTS, Plaintiff :
:
v. : **COMPLAINT**
:
Donald T. Devine, Defendant :

1. On or about December 6, 1960, the plaintiff, William E. Alberts, Ph.D., now of 114 Summer Street, Somerville, Middlesex County, Massachusetts, at that time a minister in good standing with the Southern New England Conference of the United Methodist Church, consulted the defendant, Donald T. Devine, M.D., of 1144 Brush Hill Road, Milton, Norfolk County, Massachusetts, who was at that time, and at all times material to this complaint, a psychiatrist practicing in Boston, Suffolk County, Massachusetts, with respect to certain psychological difficulties then being encountered by the plaintiff.

2. At the time of the initial consultation alleged in paragraph 1, or alternatively at the time of various subsequent consultations as appears more fully below, the plaintiff and the defendant entered into an express contract or contracts for the provision of professional psychiatric services and treatment of the plaintiff by the defendant. Said services and treatment were provided by the defendant for a fee, and the contract or contracts pursuant to which they were provided is or are evidenced by the statements of account, rendered on the defendant's stationery, and sent to the plaintiff by the defendant from time to time between December 6, 1960 and December 31, 1972.

3. As an implied condition of the contract or contracts described in paragraph 2, and as a result of the defendant having held himself out to the plaintiff as a professional psychiatrist, the defendant warranted and represented to the plaintiff that the defendant would keep confidential all information, observations and opinions relating to the diagnosis, condition, behavior and treatment of the plaintiff gained by the defendant during the course of treatment of the plaintiff, and the plaintiff reasonably relied on said warranty and representation to his great damage.

4. The plaintiff continued to consult the defendant and the defendant continued to advise and treat the plaintiff pursuant to the contract or contracts described in paragraphs 1, 2 and 3 through November of 1972, and the plaintiff paid the defendant a total of approximately $750.00 for the services rendered pursuant thereto.

5. During one or more sessions for the treatment of the plaintiff held at the office of the defendant between October 26, 1972 and November 30, 1972, the plaintiff specifically instructed the defendant not to disclose certain facts and circumstances theretofore related to the defendant by the plaintiff in confidence, and the defendant, referring to his many years of experience as a physician, stated that he would respect the confidential nature of the relationship between doctor and patient.

6. On one or more occasions prior to June 7, 1973, the defendant disclosed to the plaintiff's superior in office, Bishop Edward G. Carroll of the United Methodist Church, or to the agents, servants, personal representatives of Bishop Carroll, or to other person or persons unknown, information concerning the diagnosis, condition, behavior or treatment of the plaintiff. Such disclosure was made without the knowledge or consent of the plaintiff, and was made in breach of the implied condition of confidentiality of the contract and the implied warranty of confidentiality alleged in paragraph 3, and in violation of the plaintiff's express instruction and the defendant's express representation described in paragraph 5.

7. As a result of the disclosure alleged in paragraph 6, the plaintiff suffered great mental anguish and humiliation, loss of livelihood, damage to his reputation, alienation of the respect and confidence of his colleagues, parishoners and friends. As a result of the disclosure alleged in paragraph 6, and using the information communicated thereby as a public justification, Bishop Carroll caused the plaintiff not to be reappointed as Minister of Old West Church in said Boston. As a result of the disclosure alleged in paragraph 6, the plaintiff has been obliged to incur expenses in the amount to date of approximately $2,000.00 for:

a.) the continuing psychological treatment of depression and anxiety and other disabling mental trauma produced or aggravated by the events resulting from the alleged disclosure;

b.) the assembly of rebuttal evidence and testimony in support of the plaintiff's efforts to retain his standing in the United Methodist Church; and

c.) travel and other costs connected with the plaintiff's efforts to secure alternate employment.

As a result of the disclosure alleged in paragraph 6, the plaintiff suffered the loss of benefits that would have accrued to him under the terms of a proposed contract of employment with the United Methodist Church for the year beginning June 7, 1973, totalling approximately $18,500.00, and he also suffered an impairment of his capacity for future earnings in the amount of approximately $200,000.00 by reason of the termination of his career as a Methodist minister, by the alienation of the editors and publishers of various church oriented media in which the plaintiff had formerly published extensively, and of the producers of various radio and television programs on which the plaintiff had formerly appeared, and by virtue of the alienation of various prospective employers of the plaintiff, several of whom have indicated to the plaintiff that he would not be considered for employment because of adverse publicity stemming from the use of the information gained through the disclosure alleged in paragraph 6 to secure the forced retirement of the plaintiff from his position as Minister of said Old West Church. As a direct consequence of the disclosure alleged in paragraph 6 the plaintiff suffered loss of employment and was left with very few cash reserves; in January of 1974, the plaintiff was forced to terminate a pension fund being held for his benefit by the United Methodist Church, which termination prior to the plaintiff's having reached retirement age resulted in the loss of $4,600.00 contributed to the fund by the various churches served by the plaintiff during his career. The plaintiff therefore alleges that the defendant is responsible for the loss of these pension fund monies as well.

Wherefore the plaintiff demands judgement against the defendant in the amount of three hundred seventy-five thousand ($375,000.00) dollars, interest and costs.

The plaintiff claims the right to a jury trial of all issues.

Signed ______________________________
Bruce V. Keary
Attorney for the Plaintiff
Address 88 Calumet Street
Boston, Mass 02120
Telephone 277-4741
Date March 4, 1975

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. **March 4, 1975**

Subscribed and sworn to before me,

____
Notary Public
My commission expires:

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. **SUPERIOR COURT**
No. 114902

WILLIAM E. ALBERTS, PLAINTIFF :
: PLAINTIFF'S MOTION
v. :TO AMEND THE COMPLAINT
:
DONALD T. DEVINE, DEFENDANT :

Now comes the plaintiff and moves this honorable court for an order granting leave to amend the complaint in the above-captioned action pursuant to Rule 15(a) of the Massachusetts Rules of Civil Procedure by naming the following persons as additional parties defendant:

Edward G. Carroll
53 Worthington Road
Brookline, Massachusetts 02146

John E. Barclay
128 Bellevue Street
West Roxbury, Massachusetts 02132

and by adding the following language:

A. Additional paragraphs 4a-4e, to be inserted following paragraph 4:

"4a. The defendant Edward G. Carroll resides at 53 Worthington Road, Brookline, Norfolk County, Massachusetts.

"4b. The defendant John E. Barclay resides at 128 Bellevue Street, West Roxbury, Suffolk County, Massachusetts.

"4c. The defendant Carroll was appointed Resident Bishop of the Boston Area of the United Methodist Church in July of 1972 and served thereafter at all times material to this complaint as President of the Southern New England Conference of the United Methodist Church.

"4d. The defendant Barclay was for some time prior to July of 1972, and at all times thereafter material to this complaint the District Superintendent of the Greater Boston District of the Southern New England Conference of the United Methodist Church.

"4e. From July of 1972 and thereafter at all times material to this complaint the defendants Carroll and Barclay were the immediate superiors in office of the plaintiff within the established hierarchy of the United Methodist Church."

B. Additional paragraphs 6a-6c, to be inserted following paragraph 6:

"6a. On or about April 9, 1973, the defendants Carroll and Barclay, knowing the plaintiff to have been a patient of the defendant Devine, agreed to seek information concerning the plaintiff from the defendant Devine. Thereafter the defendant Carroll arranged an interview with the defendant Devine. At that interview, held on or about April 9, 1973, the defendants Carroll and Barclay induced the defendant Devine to breach the plaintiff's trust by soliciting the disclosures described in paragraph 6.

"6b. On various occasions between April 9, 1973 and June 7, 1973, the defendants Carroll and Barclay informed numerous individual members of the Southern New England Conference, as well as the various boards, committees and subcommittees of that Conference concerned with the appointment of its ministers to local churches, of their opinions of the plaintiff's mental health.

"6c. On various occasions between April 9, 1973 and June 7, 1973, the defendant Carroll related to individual members of the public, to public gatherings, and to reporters who he knew or should have known would cause his statements to be printed in the press, his belief that the plaintiff was mentally ill and therefore unappointable, and the fact that this belief was based on "competent consultation'."

C. The prayer on the last page of the complaint should be amended to read "Wherefore the plaintiff demands judgment against the defendants in the amount of $375,000.00, interest and costs."

The plaintiff informs the Court that the foregoing amendments are proposed as a result of the discovery of facts not known to the plaintiff at the time of filing of the original complaint, and are necessary in the interest of substantial justice.

by his attorney

Bruce V. Keary
Box 782
Boston, MA 02120 277-4611

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. **SUPERIOR COURT**
CA NO. 114902

William E. Alberts, Plaintiff)
) **Memorandum on Status of**
v) **the Parties and Causes**
) **of Action for Report**
Donald T. Devine, ET AL, Defendants)

In order to provide a background of the status of the parties and to properly report the issues in question, it is necessary to set forth the travel of this case together with the dispositions of the court.

Original Complaint

At all times relevant to this action commenced in March of 1975, the plaintiff, William E. Alberts, was an ordained minister with the Southern New England Conference of the United Methodist Church. The defendant in the original complaint, Donald T. Devine, was a licensed physician in the Commonwealth of Massachusetts with a specialty and practice in the field of psychiatry.

In his original complaint, plaintiff stated that he became a patient of the defendant on October 26, 1972 and was treated by Dr. Devine until November 30, 1972.

Setting forth his cause of action, the plaintiff alleges in paragraph one of his complaint that an express contract arose between the plaintiff and the defendant for professional services to be rendered. Plaintiff further states in paragraph two that the defendant 'warranted' and 'represented' to the plaintiff as an 'implied condition' that he would keep confidential all information, observations and opinions derived from the course of treatment and that the plaintiff relied upon said warranty and representation. Paragraph five within said complaint refers to specific instructions directed to the plaintiff by the defendant not to disclose facts or circumstances revealed in confidence and that the defendant agreed to respect the confidential relationship. The alleged 'breach of the implied condition of confidentiality of the contract' and 'breach of the implied warranty of confidentiality' in the terminology of the plaintiff occurred or arose as a result of a conversation or conversations held between Bishop Edward

Carroll and Reverend John Barclay, the plaintiff's superiors in the Methodist Church. From that alleged breach, plaintiff submits that he suffered damage including but not limited to his not being reappointed to his post as minister of the Old West Church in Boston.

A reading of the original complaint with the terminology employed would lead to the conclusion that the cause of action sounded purely in contract leading the defendant to file his motion to amend his answer in February of 1983 to add the defense of the Statute of Frauds.[1]

Broadly construing the plaintiff's allegations and reading them as a whole together with the further allegations in his amended complaint, it would appear that the plaintiff states a cause of action for breach of a confidential relationship which sounds in tort and not purely in contract.

A further issue raised and the subject of a motion to dismiss by the defendant Devine is whether the elements of the cause of action as distilled from the complaint by the court is cognizable within the Commonwealth of Massachusetts as a cause of action for which relief may be granted.[2]

Amended Complaint

In December of 1975, plaintiff amended his complaint to add Edward G. Carroll who, at that time, held the position of Resident Bishop of the Boston Area of the United Methodist Church and further held the position of President of the Southern New

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[1] Defendant's motion to amend his answer was denied based upon the premise that the complaint did not sound purely in contract.

[2] See: Memoranda on defendant's motion to dismiss together with plaintiff's motion to amend his complaint and defendant's motion for summary judgment all appended.

England Conference of the United Methodist Church. In addition to the defendant Carroll, plaintiff added John E. Barclay, an ordained Methodist minister who, at that time, held the position of District Superintendent of the Greater Boston District of the Southern New England Conference of the United Methodist Church.

Plaintiff's cause of action against defendants Carroll and Barclay is stated in subparagraphs 6a through 6c and in summary alleges that Carroll and Barclay agreed to seek information from defendant Devine and on April 9, 1973 met with Dr. Devine and 'induced' Devine to 'breach the plaintiff's trust' by soliciting disclosures concerning the diagnosis, condition, behavior or treatment of the plaintiff. Plaintiff further alleges that Carroll and/or Barclay disseminated this information or their opinions concerning plaintiff's mental health to divers members and committees within the Southern New England Conference of the United Methodist Church. Plaintiff alleges further dissemination of said information by the defendant Carroll to members of the public and the press.

Reading the original complaint together with the amended complaint, the question arose as to whether the plaintiff based his cause of action against defendants Barclay and Carroll upon intentional tortious conduct by the defendants with the predication that the relationship between the plaintiff and the defendant Devine was a fiduciary or confidential relationship. Referring back to the original complaint that had the initial appearance of sounding purely in contract, the first impression of the cause of action within the amended complaint is one of alleging a tortious interference with a contractual relationship. Nevertheless, the status of the parties and the nature of the relationship does not lend itself to the standard or classic form of a tortious interference with the contractual relationship and the cause of action against defendants Barclay and Carroll is at best reduced to, as stated in the complaint, an inducement of defendant Devine to breach the relationship of trust with the plaintiff.

In February of 1983, plaintiff filed a motion to amend his complaint by adding counts sounding in malpractice as against the defendant Devine and invasion of privacy as against all defendants. The count alleging malpractice was subsequently withdrawn and an amended motion for leave to amend complaint to add a count for invasion of privacy as subparagraph 6d was filed.[3]

In February of 1983, the defendants Barclay and Carroll moved to amend their answer by adding an eighth defense, to wit:

> "The alleged actions by these defendants, if taken at all, were taken pursuant to their duties and authority as the plaintiff's superiors in the hierarchy of the United Methodist Church and as such are privileged and immune from inquiry by this court under the First and Fourteenth Amendments of the United State Constitution."

The amendment to the answer was allowed as a basic predicate to the rulings of this court upon the motion of the defendants Barclay and Carroll for summary judgment.

Brief Summary of the Status of the Parties and Case on Report

There existed in 1972 a patient/psychiatrist relationship between the plaintiff, William Alberts, and the defendant, Donald T. Devine, which ended on November 30, 1972 at the plaintiff's election.

In April of 1973, the defendant, John Barclay, as the plaintiff's immediate superior in his role as Superintendent, recommended to the defendant, Bishop Carroll, that they consult with the defendant Devine. The three parties met on April 9, 1973.

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[3] See Memorandum of Decision on denial of plaintiff's motion to amend his complaint as to invasion of privacy.

The plaintiff claims that Devine revealed certain confidences to the defendants Barclay and Carroll. Devine contends that he revealed no confidential information to the defendants. This issue remains as a question of fact in the case of the plaintiff against Dr. Devine. The plaintiff submits that thereafter the defendant Carroll made statements to the public concerning his opinion of the plaintiff's mental health and that further discussions were held between Carroll and various members of the Annual Conference of the United Methodist Church relative to the plaintiff's mental or emotional health. The plaintiff claims that as a result, the conference refused to reappointment [sic] him to his ministerial post and that he was retired by vote of the conference.

Significant among the damages claimed by the plaintiff is the loss of livelihood specifying both salary loss and future retirement benefits.

The plaintiff brings before this civil court the actions of his superiors together with the actions of the governing and appointing body of the United Methodist Church. To establish a significant factor in his damages as claimed, the plaintiff would be required to show that the actions of his superiors were the proximate cause of his loss of livelihood. In proof of this element of damages, it would be required that judicial inquiry be made of the processes of appointment or nonappointment by the governing body of the church together with consideration by a civil court of the interpretation and application of certain codes or canons of this church as embodied within its 'Book of Discipline'.

The defendants Barclay and Carroll have appropriately raised the question of law relative to the actions of the church concerning one of its ministers and the privileges and immunities granted under the First and Fourteenth Amendments of the United States Constitution. This court entered summary judgment for both Barclay and Carroll on the constitutional issue as raised.[4]

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[4] See Memorandum of Decision on allowance of summary judgment for defendants Barclay and Carroll.

Although the case against the defendant Devine remains facially viable, any further discovery or testimony by the defendants Barclay and Carroll would result in their invocation of the privileges or immunities heretofore discussed. Therefore, the plaintiff would be prevented from establishing any causal nexus between the purported breach by Devine and the subsequent actions of Barclay and Carroll in presenting his case for damages.

The allowance of the summary judgments for Barclay and Carroll so affects the merits of this controversy that the trial between the plaintiff and Devine is stayed.

The issues raised on the summary judgments are reported after decision and entry of final judgment as to Barclay and Carroll and the issues raised on interlocutory matters of the plaintiff's motion to amend to add a count of invasion of privacy and the denial of defendant Devine's motion to dismiss for failure to state a cause of action cognizable by this court are further reported due to the nature of the complaint as filed and the status of the pleadings.

By the Court,

Elizabeth J. Dolan
Associate Justice
Superior Court
Dated: __________________

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. **SUPERIOR COURT DEPARTMENT**
CIVIL ACTION NO. 114902

WILLIAM E. ALBERTS)
)
) WILLIAM E. ALBERT'S
V.) AFFIDAVIT IN OPPOSITION
) TO DEFENDANT BARCLAY'S
DONALD DEVINE,) MOTION FOR SUMMARY
et al.) JUDGMENT

William E. Alberts deposes and says as follows:

1. At all times relevant to this case I was an ordained minister in the United Methodist Church and the minister of Old West Church in Boston, Massachusetts.

2. While I was a Ph.D. candidate at Boston University School of Theology, I experienced a sort of writer's block while working on my dissertation. At that time, I began to see Dr. Donald T. Devine, a psychiatrist, for therapy. I continued as Dr. Devine's patient until November 30, 1972 when I terminated the doctor-patient relationship

3. During the course of my ministry at Old West Church, I initiated and/or participated in a number of projects that were controversial. These ranged from advocating that the funds from John Barclay's former church (Church of All Nations) be turned over for social programs and for the purpose of a group of Black Methodist ministers, to getting arrested at an anti-war sit-in, to performing a marriage of homosexuals.

4. According to deposition testimony of each of the three defendants, defendants Barclay and Carroll, on April 9, 1973, consulted with my former psychiatrist, defendant Devine, and obtained information from him concerning my mental condition.

5. Defendant Carroll in his deposition stated that defendant Barclay suggested that he and Carroll meet with Devine and that Barclay arranged for the meeting. See page 59 of the transcript of Carroll's deposition attached hereto as Exhibit 1 and incorporated herein by reference. According to Carroll's deposition testimony, Devine stated that the Dr. Alberts was paranoid. See page 66 and 67 of Carroll's deposition attached hereto as Exhibits 2A and B and incorporated herein by reference.

6. Defendant Barclay admitted in his deposition that it was he who arranged the meeting among Devine, Carroll and Barclay. See page 100 of the transcript of this deposition attached hereto as Exhibit 3 and incorporated herein by reference.

7. After the April 9, 1973 meeting among the defendants, defendant Carroll made public declarations that I was "sick" and/or "paranoid" and that he had obtained this information from psychiatrists who knew me. He made these statements to a *Boston Globe* reporter on or about April 13, 1973, to me on or about April 30, 1973, to a press conference on or about May 7, 1973 and to a meeting of a United Methodist Church committee on May 14, 1973 and again on May 24, 1973.

I have a tape recording of the May 7, 1973 press conference at which the statements were made and I recognize the voice of Edward Carroll. A copy of the minutes of the May 14, 1973 committee meeting is attached hereto as Exhibit 4 and incorporated herein by reference.

8. Defendant Carroll also stated to me on April 30, 1973 that he would not appoint me because of my mental condition. He reiterated this statement at a gathering at his house on May 4, 1973. At that time he also revealed that one of the psychiatrists upon whom he was relying had examined me.

9. In his deposition, defendant Carroll stated that the only psychiatric information about me came from Devine and he had a casual conversation with an unidentified friend and psychiatrist who helped to define some terms. See 83 and 84 of this deposition attached hereto as Exhibits 5A and B and incorporated herein by reference.

10. The power to appoint a person to a post of a minister is held exclusively by the Bishop of a particular conference. During the events under consideration, defendant Carroll was the Bishop of my conference and he alone held this power.

The Conference had the power to define my relationship to the Conference, but could not make an appointment of me to a post. After Carroll determined that he would not appoint me to be minister of Old West Church, or any church as he stated to me, the Conference was convinced by him to change my status to forcible retirement.

11. The Bishop's sole responsibility for appointments was verified by defendant Barclay in his deposition. See page 44 of his deposition attached hereto as Exhibit 6.

12. Pages 182 and 183 of the Book of Discipline of the United Methodist Church spell out the duties of a Bishop in making appointments of ministers. This book sets out basic rules by which the United Methodist Church operates. Copies of these pages are attached hereto as Exhibits 7A and B and incorporated herein by reference.

13. I have read the affidavit of John Barclay. In paragraph 3 of that affidavit he states that he "counselled" me at my request concerning marital problems. This is not true. Reverend Barclay did not counsel me in regard to this problem. I attended his deposition and to the extent that he was allowed to testify about the relationship between him and me, he never made such an assertion. In his testimony he stated that he suggested that Bishop Carroll meet with Dr. Devine to assist the Bishop, contrary to his assertion in paragraph 4 of his affidavit.

14. None of the defendants requested my permission for their consultation of April 9, 1973 nor was any given. Previously, I had instructed Dr. Devine not to discuss my situation with Bishop Carroll or anyone else.

15. As part of the agreement between Dr. Devine and myself I thought that our relationship was completely confidential. Dr. Devine testified that he maintains strict confidentiality with his patients. See copy of page 108, Vol. 2 of Devine's deposition attached hereto as Exhibit 8 and incorporated herein by reference.

Signed this 25th day of January, 1983 under the pains and penalties of perjury.

William E. Alberts

Q And who requested this meeting with Dr. Devine?

A At the suggestion of the superintendent, John Barclay, he thought that I should talk with Dr. Devine; and arranged for my meeting with him.

Q When you say at the suggestion of John Barclay, did you talk to John Barclay about Bill Alberts subsequent to this March 21 meeting?

A I probably did. He's the superintendent; and we would have been in conversation about him in terms of the leave and other matters.

Q Well, did you have a conversation with him about Bill Alberts? With Barclay, I'm talking about now.

A I had the conversation about his getting the leave; and that the provision of the care of the church had been arranged. Sure.

Q Well, I want to know what you said to Bill Barclay and what he said to you.

A You mean to John Barclay.

Q John Barclay. That's what I'd like to find out.

A I think I said ——

Q And if you could be so kind as to state just about approximately when you said this, and where.

A At some time before this, you know ——

Q Before ——

to believe that he was emotionally —— that's not, I don't know how to say it ——

Q Just say what you said.

A That he had fears of me; and the like.

And I stated to the doctor that as a minister, I have done this; I have, in dealing with parishoners and trying to make sure of pastoral care, I have simply consulted —— after explaining, you know, certain behavior and feelings and actions and all, you know, what kind of person do you feel I'm dealing with. Most of these have been informal discussions. I mean, nothing —— I mean, no technical or anything like that. And psychiatrists have usually said, well, you know, I think you're dealing with this kind of a personality or that kind of a personality; and you should relate yourself in this way or that way.

So I explained this to Dr. Devine. And so I said, I know that he had treated Dr. Alberts, and I wanted him just to give me some help in terms of the kind of personality, if there was any, you know — with whom I was dealing.

And he said to me, "Well, Bishop, you're dealing with paranoia of the self-destructive type." And that it would be good that he would get help. He realized he wasn't coming to him, because he had broke with him; but that he felt that he needed an M.D. psychiatrist —— whether he'd go to someone else for purposes of getting any kind of medication that he needed. And could —— and if he did this in time, he probably would be all right, and could assume his duties as a Pastor.

Now, we might have talked about other things. If you know me, —— you don't know me; but I don't like to waste people's time, but one thing can go to another. I think we talked about the homosexual issue, because this was in the press; and this could consume some time.

Q Well, could you tell us what you discussed about the homosexual issue, to the best of your memory?

A Only the things that were reported in terms that I had objected to this marriage, and how I felt about it.

Q Would you state what you said? To Dr. Devine, I'm talking about; what you said to him.

A Well, I'm not sure that all this took place, you see.

Q Well, to the best of your memory.

A To the best of my memory, I simply repeated my feelings

A Within a week.

Q What is it that you said to Dr. Devine when you called him on the phone, sir?

A Well, one of our pastors has been seeking to be an effective minister, and we have a difficult situation at Old West Church, and he has indicated and other folks are aware that you had been his therapist. Would you be willing to meet with the Bishop and it developed in the conversation how the Bishop and I could be helpful in the resolution of what his client is going through and how that might best be effected.

Q And you had, of course, talked this over with Dr. Alberts ahead of time?

A Would you phrase that again?

Q You had gone to Dr. Alberts and talked it over with him, talked over this meeting with Dr. Devine?

A No. We did dicuss at the meeting at my house, when he was tired, worn out, and I proposed that I be willing to call a meeting of the pastor/parrish relations committee and the leave of absence be granted.

Q My question ———

A Excuse me. And he said, "John, would you?"

DONALD DEVINE DEPOSITION

Vol. I, pages 59-61

Filed by defendants Carroll & Barclay

A. You use this word "respond" in a way I cannot understand.

Q. Well, I guess I better get to it. Did Bishop Carroll come to you about Dr. Alberts?

A. Yes, he did.

Q. And what did he say when he came to see you?

A. Well, may I preface it by saying that the Rev. John Barclay, who was District Superintendent at the time, called me to arrange for an appointment for his superior, the Bishop, to see me, stating that the Bishop felt Bill was too sick to function in the ministry and the Bishop wanted to discuss with me how best to present this to Bill in a christian way and to get him the help that he needed.

Q. In other words, the initial phone call from the Bishop's office, as it were, from the Methodist structure, came from Rev. Barclay.

A. Yes.

Q. And in the initial phone call, he mentioned that he wanted to speak to you about your patient, Dr. Alberts.

A. My former patient. Bill had adamantly

Supreme Court, U.S.
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OCT 24 [illegible]
JOSEPH F. SPANIOL, JR.
CLERK

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No. 85-500

In The

Supreme Court of the United States

October Term, 1985

EDWARD G. CARROLL and
JOHN E. BARCLAY,

Petitioners,

v.

WILLIAM E. ALBERTS and
DONALD T. DEVINE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF OF RESPONDENT, WILLIAM E. ALBERTS, IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First and Fourteenth Amendments to the United States Constitution exempt petitioners, Edward G. Carroll and John E. Barclay, from the application of Massachusetts tort law because of petitioners' status as clergy and their asserted belief that they were performing their duties as members of a church.

2. Whether the First and Fourteenth Amendments to the United States Constitution exempt petitioners, Edward G. Carroll and John E. Barclay, from the application of Massachusetts tort law because one of the elements of damage is respondent William E. Alberts' claim that petitioners' tortious conduct caused the respondent to lose his ministerial post.

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BRIEF OF RESPONDENT, WILLIAM E. ALBERTS, IN OPPOSITION

STATEMENT OF THE CASE

This statement of the case contains the operative facts of this case and corrects the many misstatements and omissions of the petitioners' statement of the case.

In the spring of 1973 Dr. William E. Alberts, plaintiff/respondent, was a minister in The United Methodist Church. Defendant/petitioners Bishop Edward G. Carroll and District Superintendent John E. Barclay were his superiors in the Southern New England Conference of The United Methodist Church. Dr. Alberts had been a private psychiatric patient of defendant/respondent Donald T. Devine, M.D. for many years and had terminated therapy with Devine in November, 1972 (A. 104).[1]

On or about April 9, 1973, the petitioners, with full knowledge of the patient-physician relationship between Alberts and Devine (A. 110) and with full knowledge of the confidential nature of it, initiated a consultation with Dr. Devine on the subject of Alberts' mental health (A. 104). Dr. Alberts had no knowledge of this consultation with his psychiatrist and petitioners' had not sought Alberts' consent for this consultation (A. 106).[2]

Petitioners were fully aware of the confidentiality of the relationship. Barclay, in his deposition, in response to the question of what did Dr. Devine say in the April 9, 1973 consultation, stated that

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[1] The references to the petitioners' appendix are indicated by "A—" and indicate the actual page number of the petitioners' appendix, not the page numbers indicated in the index to the appendix, which are sometimes incorrect.

[2] Petitioners attempt to create a "background" to justify their actions by stating that 1) the Alberts-Devine confidential relationship had ended "stormily", 2) that a leave of absence taken by Dr. Alberts was somehow tied to mental health issues, and 3) that Dr. Alberts' ministerial appointment was up in the air because of these matters (Petition, at pages 3-4). A thorough search of the record finds no support for these "background" assertions.

> [t]he important thing to me was his high professional and ethical point of view that we were asking questions that had to do with one of his patients and that he could not be completely revealing.

(R.A. 8)[3]

Carroll, in his deposition testimony regarding this same consultation, stated

> And so I said, I know that he had treated Dr. Alberts, and I wanted him to just to give me some help in terms of the kind of personality, if there was any, you know—with whom I was dealing.
>
> And he said to me, 'Well. Bishop, you're dealing with paranoia of the self-destructive type.'

(A. 108, 109).[4]

Soon thereafter, petitioner Carroll held a press conference, and even before that made a press statement that Dr. Alberts was mentally ill: "sick" and/or "paranoid," (A. 105)[5], unable "to assume pastoral responsibilities anywhere," should "apply for 'disability leave'" and that his judgment was "based upon competent consultation." See Carroll's press release (R.A. 1)[6]. Carroll also repeated these allegations at a public meeting, stating that he would not appoint Alberts to a ministerial post because of his mental condition (A. 105).

---

[3] The reference "R.A. —" indicates the Respondent's Appendix which is appended to this brief. The Respondent's Appendix contains documents that were filed in opposition to the petitioners' motion for summary judgment and which were included in the record of this case before the Massachusetts Supreme Judicial Court. These are key documents omitted by petitioners from their appendix.

[4] Any dispute concerning what was disclosed by Devine to petitioners (Petition, at page 4) arises because the defendant/petitioners and defendant/respondent Devine now point the finger of guilt at each other.

[5] In his affidavit (A.105, ¶ 7) Dr. Alberts states that Carroll made a statement to the press on April 13, 1973. This date is incorrect. The correct date is May 5, 1973. April 13, 1973 was the date of another press statement from Carroll which is not in the record.

After Carroll made these statements to the press, he and Barclay repeated the allegation of Dr. Alberts' mental illness to committees within The United Methodist Church charged with recommending the status of ministers, including the Board of Ministry. See Alberts' affidavit (A. 105) and the minutes of the Board of Ministry's Conference Relations Committee where Carroll and Barclay alleged that Dr. Alberts was mentally ill (R.A. 3).[7]

---

[6] Petitioners contend that it was Alberts who brought this and other issues to the attention of the press after they were discussed in the various committees and the Board of Ministry of the church (Petition, at page 4). This contention finds no support in the record.

[7] This body voted, "after prolonged discussion with Bishop and John Barclay, District supt., . . ." to recommend to the Board of Ministry that Alberts be;

1) granted disability leave . . .

2) if Alberts refuses . . . , then he could be granted supernumary relationship which would provide no financial assistance . . .

3) if Alberts refuses both (1) and (2), then he would be given involuntary location . . . and he would sacrifice all relationship with the annual conference.

The minutes note in closing that

> [t]hese decisions reached on basis of discussions and statements from three psychiatrists who are knowledgeable of the Alberts' case.

(R.A. 3-4)

(Continued on following page)

Deposition testimony and documents establish that *after* petitioner Carroll consulted with Devine, on April 9, 1973, and because of the consultation, he decided that he would not reappoint Alberts. See Carroll's press release (R.A. 1-2) and the minutes of the Board of Ministry's Conference Relations Committee (R.A. 3-4) and Carroll's testimony (A. 108-109).[8]

Shortly *before* the annual meeting of the Southern New England Annual Conference in June of 1973, Carroll communicated to the chairperson of the Board of Ministry, Oliver Drake, that Dr. Alberts was "unappointable" (A. 91). At the annual meeting itself Carroll read his communication to Drake to all the ministerial delegates of the Conference. Immediately after Carroll read the communication that Dr. Alberts would not receive an annual appointment, the Board of Ministry (the same board to whom the petitioners presented their allegation of respondent's mental illness) recommended Alberts forced "retirement" and that recommendation was adopted by a majority of the ministerial members of the Conference. (A. 91).[9]

A motion was made on Alberts' behalf to submit the matter to a church trial, but Carroll, who as Bishop chaired

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(Continued from previous page)

These "proposals," such as they were, arose directly out of the breach of the patient-physician relationship. See Petition, at page 4.

[8] Contrary to the impression created by petitioners (Petition, page 19) it was respondent Devine, *not* Carroll, who claimed, in deposition testimony, given ten years after Carroll's press conference, that Carroll had already made up his mind to terminate Alberts. This deposition testimony, that seems to be attributed to Carroll by the petitioners is actually that of Devine's not Carroll's (A. 111-112).

[9] Bishop Carroll had the sole power to appoint ministers to a post. This is entirely separate from the decision of the Conference regarding a minister's relationship to the Conference.

(Continued on following page)

the Conference meeting, ruled the motion out of order and a trial was blocked.[10]

Dr. Alberts filed this action seeking damages for mental anguish, loss of earning capacity, and damage to his reputation (A. 5). He alleges in this action that Carroll's refusal to reappoint him or assign him to any church in the Conference and the vote of the annual conference terminating him, as well as other damages, were caused by the breach of the confidential relationship between Alberts and Devine.

The petitioners argue here, as they did before the Massachusetts Supreme Judicial Court, that their actions were cloaked with the innocence of devout clergy members.

(Continued from previous page)

Neither the ministers of the Conference nor the Board of Ministry had the power to grant or deny a minister a ministerial post. See ¶ 59 of the Book of Discipline (A. 48). Thus, it is inaccurate for the petitioners to repeatedly assert that the status and the appointment of ministers is decided by the ministers of the Conference upon the recommendation of the Board of Ministry (Petition, at pages 3, 4, 11, 15, 16 & 20).

Petitioners' claim that "literally hundreds" (Petition, at page 19) or "over three hundred" (Petition, at page 4) ministerial members of the Conference voted to retire Alberts is not supported in the record.

Petitioners make the obscure, if not irrelevant, statement that Dr. Alberts' so called "retired relation" status was for one year, as if to suggest that he had not been publicly slandered and discredited in the church and the community, by their allegations of mental illness and unemployability.

[10] The petitioners' argument that "Rev. Alberts never filed charges against Bishop Carroll or Rev. Barclay for having spoken to Dr. Devine . . . (Petition, at page 5)" is misleading in that Dr. Alberts did not know of the breach of the patient-physician relationship until after he was forcibly retired.

The record does not support this claim in several respects. Their clerical duties certainly did not include calling a press conference, and making press statements about Dr. Alberts' alleged mental illness. Absent from the record is any claim or even suggestion that the petitioners sought to counsel or otherwise give support to Dr. Alberts after they consulted with his former psychiatrist.

Carroll and Devine's less than innocent state of mind is revealed by the exchange of letters between petitioner Carroll and respondent Devine, expressing concern that the tape recording Carroll made of their April 9, 1973 consultation be destroyed so that Dr. Alberts could never obtain it. (R.A. 5-7).[11]

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[11] Devine wrote,

> In the course of all this, I think of the Watergate affair and the Nixon tapes as well as my advice to you that you give Bill no specific details that he could distort and refute. I should be greatly relieved if your tape recording of our conference were erased. . . . Bill and his lawyers could make much of it if it were subpoenaed into court.

(R.A. 6) Carroll replied,

> May I assure you that I agree with your feeling about the disposition of the tape. As soon as I return to Boston (Aug. 24) I will find the tape and erase it. I say find it because I purposely did not label it after you forgave me for recording you without your permission and asked that our talk be kept confidential.

(R.A. 7)

REASONS FOR DENYING THE WRIT

Petitioners, through their analysis of the religion clause of the First Amendment[12], seek to exempt themselves from the application of civil tort law of the Commonwealth of Massachusetts. That law imposes liability for all damages flowing from the inducement of a psychiatrist to violate the duty of confidentiality arising from the patient-psychiatrist relationship (A. 13-14).

They argue 1) that their tortious conduct is exempt from civil liability because they were merely adhering to their religious beliefs and performing their ecclesiastical duties, and 2) that to award damages to the respondent, Dr. Alberts, for the loss of his ministry, caused by their tortious conduct, improperly invades the decision-making of a religious body.

I. THIS CASE INVOLVES UNIQUE FACTUAL CIRCUMSTANCES WHICH WOULD LIMIT THE PRECEDENTIAL VALUE OF A DECISION BY THIS COURT.

In its essentials, this is a fact-intensive case to which the Massachusetts Supreme Judicial Court applied Massachusetts tort law principles. Its impact upon the free exercise of religion clause of the First Amendment is without significance.

This case involves a determination by a civil court that petitioners may be held liable for committing the tort of inducing a psychiatrist to breach the duty of confidentiality owed to Dr. Alberts, regardless of their religious proclivities. It does not involve a determination by a civil court of a religious tenet or belief. *Jones v. Wolf,* 443 U.S. 595, 603 (1979). Nor does it represent an entanglement of the state with the church. *Catholic High School Association v. Culvert,* 753 F.2d 1161, 1168-1169 (1985). Nor does it involve a statute or ruling having any purpose, other than a secular one, being incidentally applied to clergy members. *Braunfeld v. Brown,* 366 U.S. 599, 607 (1961). The respondent does not seek to litigate the petitioners' religious beliefs, nor to obtain reinstatement within the United Methodist Church. *Serbian Eastern Orthodox Dioceses v. Milivojevich,* 426 U.S. 696, 718-721 (1976), reh. denied, 429 U.S. 873. Dr. Alberts seeks to recover damages for loss of earnings, loss of reputation and mental anguish.

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[12] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

The Supreme Judicial Court, in its analysis of the facts, recognized that this case turned more on factual issues than constitutional ones.

> It is clear that the assessment of an individual's qualifications to be a minister, and the appointment and retirement of ministers, are ecclesiastical matters entitled to constitutional protection against judicial or other State inference. *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952). *Gonzalez v. Roman Catholic Archbishop of Manila,* 280 U.S. 1, 16-17 (1929). *Kaufman v. Sheehan,* 707 F.2d 355, 358-359 (8th Cir. 1983). However, this case does not involve the propriety of the United Methodist Church's refusal to reappoint Alberts as minister of the Old West Church. Nor does this case involve Albert's qualifications to serve as a minister. A controversy concerning whether a church rule grants religious superiors the civil rights to induce a psychiatrist to violate the duty of silence that he owes to a patient, who happens to be a minister, is not a dispute about religious faith or doctrine nor about church discipline or internal or-

> ganization. Nor is a controversy concerning the causal connection between a psychiatrist's disclosure of confidential information and a minister's failure to gain reappointment such a dispute.

(A. 17.)

Dr. Alberts would have a jury decide whether there was a breach of a duty and whether that breach was the cause of his damages regardless of any religious reasons alleged.

II. THE MASSACHUSETTS SUPREME JUDICIAL COURT FOLLOWED THE HOLDINGS OF THIS COURT ON RELIGIOUS ISSUES.

In keeping with the rulings of this Court, the Massachusetts court held that:

> [a]lthough the freedom to believe "is absolute," the freedom to act "cannot be". Conduct remains subject to regulation for the protection of society.

(A. 16.)

The Massachusetts court went on to balance the interests of the Commonwealth, in protecting its citizens from unauthorized disclosures of extremely private patient-psychiatrist information, against the burden upon their exercise of religion.

Recognizing the importance to the Commonwealth of the patient-physician duty of confidentiality and reviewing its place in medical jurisprudence (A. 8-12), the court below noted that the policy of confidentiality " . . . has been urged or forecast *in una voce* by commentators in the field of medical jurisprudence (citation omitted) (A. 9)."

The court below observed that imposing liability on petitioners *would* inhibit them from engaging in the claimed "religiously motivated conduct" at issue here[13], in that they would not be able to breach the patient-physician confidential relationship with impunity. It then made a determination that the Commonwealth did possess " . . . an interest sufficiently compelling to justify the burden (A. 17)."

> As we have observed, churches have a significant interest in assessing the qualifications of their ministers, and in appointing and retiring them. But, in view of the freedom that ecclesiastical authorities and church members have to determine who the church's ministers will be, and in view of the numerous sources of relevant information available to assist those making such determinations—other than information available only from a minister's physician—a rule that prevents interference with physician-patient relationships will have little impact on the free exercise of religion. On the other hand, as we have discussed earlier in this opinion, public policy strongly favors judicial recognition of a physician's duty to honor the confidentiality of information gained through the physician-patient relationship. We conclude, therefore, that even if it be assumed, without inquiry, that the Book of Discipline or other rule of the United Methodist Church provides that Carroll and Barclay had a right, or even a duty, to seek medical information about Alberts from Devine, the First Amendment does not bar judicial inquiry into the church's proceedings culminating in Alberts's failure to gain reappointment.

(A. 17.)

In objecting to the application, to them, of liability for the tort of inducing a breach of the patient-physician duty of confidentiality, petitioners argue that it would violate the free exercise of religion clause of the First Amendment to determine whether

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[13] The Massachusetts court did not attempt to determine whether the petitioners' actions were religiously motivated, but rather assumed that they were for its analysis (A.16).

> (3) the defendant did not *reasonably* believe that the physician could disclose that information to the defendant without violating the duty of confidentiality that the physician owed the patient.

(Petition, at page 8). To reach this conclusion, petitioners assert that the term "reasonable belief" means a determination of the reasonableness of some *religious* belief.

Petitioners' superficial analysis misses the Massachusetts court's holding. The readily apparent meaning of the term "reasonable belief" as used by the Massachusetts court (A. 13) is a belief about the confidential nature of the physician-patient relationship, *not* a belief about some ecclesiastical duty or privilege. The lower court concluded that

> [i]n this case, deposition testimony established that Carroll and Barclay knew of the physician-patient relationship between Devine and Alberts and that they intended to induce Devine to disclose information about Alberts.

(A. 14.)

Petitioners' misreading of "reasonable belief," as used by the court below, forms the core of their arguments.

Petitioners would also have religious doctrine bar their liability because of the existence of a judiciary within the church (Petition, pages 11-14). Aside from the impossibility of the respondent invoking a church tribunal to consider these issues, (see Petition, page 13, note 4) petitioners do not claim that the church offers a parallel tort law system that could offer compensation to Dr. Alberts as the civil courts do. They also ignore the fact that the tortious conduct occurred in the secular world. The petitioners misread the Court's rulings concerning religious tribunals. Civil courts must respect the decisions of tribunals on *religious doctrine* not civil liability. *Presbyterian Church v. Hull Church,* 393 U.S. 440, 449 (1969). *Jones v. Wolf,* 443 U.S. 595, 602 (1979). Dr. Alberts does seeks a civil judicial decision on a secular civil rights issue, not a religious issue or doctrine.

In fact, petitioners also forget that the very church document that offers a religious tribunal also contradicts their church trial argument. See paragraph 1520 of *The Book of Discipline of the United Methodist Church* (A. 65):

> No such trial as herein provided shall be construed to deprive the accused of his legal civil rights.

(A. 65.)

III. PETITIONERS SEEK A RULING THAT WOULD VIOLATE THE ESTABLISHMENT OF RELIGION CLAUSE OF THE FIRST AMENDMENT.

At the center of the petitioners' erroneous argument is their insistence that church doctrine can control civil law. In essence they argue that if a defendant makes a claim that his tortious actions were prompted by religious doctrine, he cannot be held civilly liable.[14] Petitioners' requested exemption from the civil law creates serious First Amendment problems under the establishment of religion clause and would "make the professed doctrines of religious belief superior to the law of the land and in effect permit every citizen to become a law into himself." *Reynolds v. United States,* 98 U.S. 145, 45, 164 (1878).

---

[14] Petitioners, through their protective order, also would have respondent Devine exempted from civil liability because he committed his tortious acts through the inducement of clergy members.

The Massachusetts courts would then be required to honor the religious exemption claims of the hundreds of religious denominations.[15]

If Massachusetts adopted such a court-made rule it would violate the First Amendment in that it would tend to establish religion. Such a rule would have *only* a religious purpose and no secular one. It would advance religion. It would potentially entangle the government in all denominations asserting religious prerogatives. Such a religious exemption would fail each of the three tests utilized in analyzing establishment of religion cases. *Wallace v. Jaffree,* 105 S.Ct. 2479 (1985); *Lemon v. Kurtzman,* 403 U.S. 602, 612-613 (1971).

Petitioners' position if adopted would result in a situation similar to that considered and rejected by the Court in *Thornton v. Caldor, Inc.,* 105 S.Ct. 2914 (1985). The Court in *Thornton* struck down a Connecticut statute permitting an employee to be excused from work on any day designated by him or her as a Sabbath Day, because the statute would tend to aid religions and served no secular purpose.

Pressing their argument to the furthest extent, petitioners assert that Dr. Alberts essentially waived his civil rights when he became a minister (Petition, at pages 10, 11, 12 & 13). The factual basis for this claim is absent and it must be seen as just another aspect of petitioners' demand to be exempted from, and thus above the operation of civil law.

---

[15] The Court, has recognized the existence of more than three-hundred religious denominations. *Braunfeld v. Brown,* 366 U.S. 599, 606 (1961).

> The Framers did not set up a system of government in which important discretionary governmental powers would be delegated to or shared with religious institutions.

Larkin v. Grendel's Den, Inc., 459 U.S. 116, 129 (1982).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM E. ALBERTS

By his attorneys

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* Counsel of Record

APPENDIX

No. 85-500

In The

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ON PETITION FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT WILLIAM E. ALBERTS' APPENDIX

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APPENDIX A

STATEMENT BY BISHOP EDWARD G. CARROLL RESIDENT UNITED METHODIST BISHOP IN NEW ENGLAND

at a

PRESS CONFERENCE
MONDAY, MAY 7, 1973, 11:00 a.m.

RE: OLD WEST CHURCH, BOSTON, AND THE REV. DR. WILLIAM E. ALBERTS, Ph.D.

It is a painful experience for me to comment in this way on a private matter which inadvertently has become a public question in the media.

When Dr. Alberts came in to see me, as his bishop, he was accompanied by his administrative secretary, Miss Eva Young; the chairman of the Pastor Parish Relations Committee, Mr. Peter Bloom; Mr. Harry Freeman; and Mr. Ramos.

I asked Pastor Alberts to allow me to speak with him without the others present. He refused by saying that he and others accompanying him were a "corporate body" and we could discuss any matters in their presence.

After being asked about the *Boston Globe* article of April 8 and its implications concerning his future, I told Dr. Alberts that indications pointed to a possible illness which might be seriously affecting his usefulness as a United Methodist minister. I advised him that in my judgment as chief pastor, based upon competent consultation, he was not presently in a position to assume pastoral responsibilities anywhere. Therefore, I suggested that he apply for "disability leave" as provided for in the United Methodist *Book of Discipline.* I am awaiting his response to my previous proposal that he could request the aforementioned leave status by fulfilling the conditions stipulated in the *Book of Discipline.*

As resident United Methodist bishop in New England it is my considered judgment that Dr. Alberts' former full health can be restored. It is my earnest prayer that restoration take place speedily.

My pastoral directive pertaining to Dr. Alberts is not a punitive action, because of what he calls a "marriage" of homosexuals. As far as I am concerned there was no marriage inasmuch as such a union or solemnization is not sanctioned either by the Commonwealth of Massachusetts or by the United Methodist Church. My column in the May issue of *The Methodist Churchman* explains my position on this subject. The matter of the Rev. Dr. Alberts' health was an issue of concern to me long before the recent so-called "gay wedding."

May I say that under the circumstances, according to United Methodist Church polity, the disposition of Dr. Alberts' ministerial status rests with the Southern New England Conference Board of Ministry.

The door of my office is open to Dr. Alberts always, as it is to all lay persons and clergy of our Church in New England.

APPENDIX B

THE BOARD OF MINISTRY
Southern New England Annual Conference
THE UNITED METHODIST CHURCH
May 14, 1973

The Conference Relations Committee of the Board of Ministry met on Monday, May 14, 1973, at the Holiday Inn, Rt. 1, Dedham. Attending were: Drake, Coleman, Guinn, Mott, Chorpenning Barclay, and Bishop Edward G. Carroll.

The purpose of the meeting was to review the case of WILLIAM E. ALBERTS who had appeared before the Committee on May 9, at Carter Church, Needham.

F. O. Drake presided, and after prolonged discussion with Bishop and John Barclay, District Supt., Greater Boston District, the following recommendation was drafted to submit to the Board of Ministry for vote:

It is recommended that Wm. Alberts be;

1) granted disability leave for at least one year, which would allow him some financial remuneration from MRPF and retain his full conference standing;
2) if Alberts refuses to take disability leave, then he could be granted supernumerary relationship which would provide no financial assistance & no annuity claim, but he would retain his full conference standing; (could ask for annunity);
3) if Alberts refuses both (1) and (2), then he would be given involuntary location which would have no financial assistance, and he would sacrifice all relationship with the annual conference.

These decisions reached on basis of discussions and statements from three psychiatrists who are knowledgeable of the Alberts' case.

The law firm of Nissen & Csaplar, Boston, have offered counsel to the Bishop if necessary.

Respectfully submitted,

Lloyd E. Chorpenning,
Registrar

APPENDIX C

BAY STATE MEDICAL ASSOCIATES
Ten Hawthorne Place
Charles River Park
Boston, Massachusetts 02114
617-742-8870

Donald T. Devine, M.D.
Wallace F. Haley, M.D.
Malcolm L. Rosenblatt, M.D.
Benjamin Simon, M.D.

August 8, 1973

Bishop Edward G. Carroll, Sr.
General Delivery
Picton, Ontario
Canada

Dear Bishop Carroll:

As you doubtless know, Bill Alberts has appeared in the press and on television announcing his intentions of sueing us. In one of his statements, he said that two other United Methodist ministers had told him that I had "illegally breached my confidence and allowed the Bishop to rifle his file on me."

While there is no substance to his charges, there are only two Methodist clergy who have first hand knowledge of your conference with me and of what actually did go on at that time. I doubt very much that either you or the District Superintendent, John Barclay, would have supplied Bill with such erroneous material. Lawrence D. Shubow, Esq. has written me that he is representing Bill about this grievance. I have turned the matter over to my malpractice insurer.

In the course of all this, I think of the Watergate affair and the Nixon tapes as well as my advice to you that you give Bill no specific details that he could distort and refute. Accordingly, I should be greatly relieved if your tape recording of our conference were erased. While I do not feel that it contains any breeches of confidence, Bill and his lawyers could make much of it if it were subpoened into court.

I leave this matter to your discretion, but should be interested to know your reaction.

Respectfully,
/s/ Donald T. Devine
Donald T. Devine, M.D.

CC: Rev. John Barclay

APPENDIX D

General Delivery
Picton, Ontario
Canada
August 17, 1973

Dr. Donald T. Devine
Ten Hawthorne Place
Charles River Park
Boston, Mass. 02114

Dear Dr. Devine:

Your letter came when I was back in the States. This accounts for a delay in my answer to you. May I assure you that I agree with your feeling about the disposition of the tape. As soon as I return to Boston (Aug. 24th) I will find the tape and erase it. I say find it because I purposely did not label it after you forgave me for recording you without your permission and asked that our talk be kept confidential.

I pray that God will somehow let Bill know that I am really concerned about him as a person and as a Christian Minister.

Very sincerely yours,
Edward G. Carroll

APPENDIX E

Q. What did you say, sir, during that meeting?

A. I was the one who—

MS. GRIFFIN: Just what you said.

A. I expressed apprehension to Dr. Devine for his granting us the time and trusted that the exchange was helpful to the Bishop and would enable the program—the helpfulness for our brother Dr. Alberts could be worked out.

Q. That's what you said at sometime in the meeting?

A. I said that following the Bishop's expression.

Q. What did Dr. Devine say, sir?

A. The important thing for me was his high professional and ethical point of view that we were asking questions that had to do with one of his patients and that he could not be completely revealing.

Q. I think my question, Reverend, was: What did he say?

MS. GRIFFIN: I believe he just answered part of what the doctor said.

Q. Are you quoting the doctor with that?

A. I am mixed—

MS. GRIFFIN: Was the answer that you last gave something that Dr. Devine said?

TION FILED
OCT 23 1985

No. 85-500

④

In The

Supreme Court of the United States

October Term, 1985

EDWARD G. CARROLL and JOHN E. BARCLAY,
Petitioners,

vs.

WILLIAM E. ALBERTS and DONALD T. DEVINE,
Respondents.

JOINT MOTION OF THE GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH AND THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA, FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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Pursuant to Rules 36(1) and 42(2)(b) of the Rules of this Court, the General Council on Finance and Administration of the United Methodist Church ("GCFA") and the National Council of the Churches of Christ in the United States of America ("the National Council") respectfully move for leave to file a brief, a copy of which is annexed hereto, as *amici curiae* in support of the Petition for a Writ of Certiorari filed by Petitioners Edward G. Carroll and John E. Barclay.

The respective counsel for Petitioners have consented to filing of the accompanying brief pursuant to letters which are tendered herewith as Appendix Exhibits B and

C. However, the Respondent, Rev. Mr. Alberts, has refused to consent for reasons set forth in letters attached as Appendix Exhibits D and E.

GCFA and the National Council seek to appear as *amici curiae* in the instant proceeding to present additional argument on the following points:

1. The impact on the free exercise of religion by United Methodism, other denominations and the Christian Church, as a whole, if internal church procedures for the selection, evaluation and discipline of clergy are now made subject to intensive civil court review, ostensibly to aid in the resolution of tort litigation brought in a state court by a clergyman against his religious superiors.
2. Whether the ability of plaintiff to secure information to enhance and prove-up his state court suit, pursuant to a new, judicially created cause of action for wrongful disclosure of confidential medical information, is, under *Wisconsin v. Yoder*, 406 U.S. 205, 32 L.Ed.2d 15, 25 (1972), an ". . . interest of the highest order . . . not otherwise served . . ." warranting a judicial examination into the processes of church government and discipline.

The interest of the *amici* in this action arises from their concern for the constitutionally guaranteed freedoms of religious denominations to define and implement their own internal standards for the selection and assignment of their clergy, free from state scrutiny or interference. The instant decision of the Supreme Judicial Court of Massachusetts is not merely insensitive to such freedoms, but would greatly undermine them. Unlike any other reported decision in history dealing with the relations of clergy within a religious society, the Massachusetts Court flatly authorizes the judge and jury hearing Rev. Mr. Alberts' privacy case to inquire into ". . . church processes regarding the appointment and the discharge of ministers . . . ." (395 Mass. 59, 61) This is ostensibly done to enable Alberts to prove causation and establish damages resulting from the Petitioners' claimed breach of their duty relative to receipt of confidential psychiatric information.

These *Amici* do not claim that church officials are totally immune from damage suits for their secular conduct, or that they are free, in the name of religion, to ignore legitimate state law enactments. Those issues need not be reached in this proceeding. Rather, *amici* are concerned with the breadth of the decision below and the particular method chosen by the Court to implement its new tort theory as applied to these petitioners. A properly framed cause of action might indeed pass muster under the First Amendment. But, some other means of implementation must be found which avoids the church/state entanglement which is inherent in this decision.

GCFA, an Illinois corporation not-for-profit, has among its duties and concerns the safeguarding of legal interests of the United Methodist Church, an international Protestant religious denomination with approximately ten million members and 43,000 local churches. This legal responsibility derives from Paragraph 907(4) of the *Book of Discipline* (1984) of the United Methodist Church. The *Book of Discipline* contains the constitution and basic legislation of United Methodism and constitutes the pronouncement of the highest authority or judicatory in the denomination. It is the evolution of over 200 years of church law and usage.

The National Council is the cooperative agency of 30 Protestant and Eastern Orthodox national religious bodies having an aggregate membership of over 40 million in the United States. It seeks to express the concern of those diverse religious bodies for the correction of the decision of the Supreme Judicial Court of Massachusetts because of the threat it poses to their internal processes of clergy selection and discipline.

The unprecedented attempt here to authorize a civil jury to determine "causation", "state of mind", "reasonableness of belief", "damages", or any other issue by probing into the mechanisms of clergy selection poses a direct threat to religious self-government. The very existence of a church can ultimately turn upon its ability to freely choose those who will preach its values. That choice must be unfettered by governmental oversight or it will become a self-conscious and inhibited one. Heretofore, all secular courts have been sensitively aware of this danger and have upheld this basic constitutional prerogative of religion. The error below must be promptly rectified.

The attached brief will address five sub-issues as follows: (a) the decision below threatens a direct, frontal intrusion into internal church workings—not merely an incidental burden or inconvenience; (b) until now, decisions of this Court and all other courts of record have uniformly insisted on an absolute prohibition against state review of clergy selection processes; (c) even assuming, *arguendo*, that the prohibition is not absolute, and the *Wisconsin v. Yoder* balancing formulation applies, the judicially created tort here in question does not rise to the level of "a state interest of the highest order" justifying an override of fundamental First Amendment freedoms; (d) Respondent Alberts failed to exhaust a variety of intrachurch remedies which were available to him, including certain declaratory remedies available in United Methodism's highest court which were not specifically identified in the Petition for Certiorari; and (e) the retroactive effect of the decision below, announcing a new tort twelve

(12) years after the events at issue took place, deprives the Church of an opportunity to react and, possibly, to order its affairs so as to avoid confrontation with the secular authorities.

Respectfully submitted,

WITWER, MORAN, BURLAGE & WITWER

By: (Signed) Samuel W. Witwer Jr.
Samuel W. Witwer, Jr.

Attorneys for the General Council on Finance and Administration of the United Methodist Church and the National Council of the Churches of Christ in the United States of America, moving for leave to file Brief as *amici curiae* in support of the Petition for a Writ of Certiorari

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INTEREST OF *AMICI CURIAE*

The interest of the *amici curiae* is set forth in the foregoing Motion for Leave to File Brief as *Amici Curiae* in Support of Petition for Writ of Certiorari, and will not be reproduced here.

STATEMENT OF THE CASE

The statement of the case contained in the Petition for Writ of Certiorari is adequate and complete, and need not be duplicated at length here. *Amici* wish only to amplify upon the following points:

1. The process for certification and assignment of United Methodist ministers is essentially one of subjective judgment by the Bishop, the District Superintendents and the clergy members of the Annual Conference. In exercising this judgment, these officials must consider not only the character and deportment of the minister, including his or her "physical, mental and emotional health" (Par. 333, Pet. App. at A-53), but also, biblical, doctrinal and theological considerations enumerated in the *Book of Discipline.* (*Id.*) Among the factors to be considered are the minister's willingness to adhere to the doctrine, rules and government of the Church. (Par. 334, Pet. App. at A-54).

2. Prior to turning to the state courts for redress, Rev. Mr. Alberts made no effort to invoke the internal church trial procedures available to him under the *Book of Discipline*, as pointed out in the Petition for Certiorari. These *Amici* point out additionally that Alberts failed to invoke certain other Disciplinary procedures of a declaratory nature. These procedures provide a mechanism for challenging interpretations of church law and provide methods for submission of such questions and internal rulings through channels which can include the Judicial Council, United Methodism's highest judicial tribunal.

Thus, Respondent Alberts was not only free to seek vindication of his position by filing charges calling for a church trial of Petitioners; he also could have asked, during an Annual Conference session, for a declaratory ruling concerning a Bishop's authority to act as he did under the circumstances at hand. Any decision following a written ruling request by Alberts would have been automatically submitted to the Judicial Council for review. *Book of Discipline* (1972) at Par. 61(3) (Pet. App. at A-49) and Par. 1512. Alternatively, Alberts might have sought a concurrence of one-fifth of the membership of the Annual Conference, so as to authorize an appeal of the question to the Judicial Council. Par. 62(4) (Pet. App. at A-19).

SUMMARY OF ARGUMENT

The decision below elevates a judicially created tort grounded in "public policy" (395 Mass. 59, 67) and Rev. Mr. Alberts' "right" to prove causation and recover damages to a station of high importance while sacrificing time-honored religious liberties of constitutional origin. The Massachusetts Court has, in effect, issued a license to a civil jury to embark upon a fishing expedition, probing "into church processes regarding the appointment and discharge of ministers." (395 Mass. 59, 61) This is inconceivable to these *amici*. It can only mean an assessment of the state of mind of religious officials and a jury determination as to what impelled them to act adversely to Alberts' interests. Ecclesiastical judgments such as these are obviously grounded heavily in doctrinal considerations, religious tenets and traditions.

Until now, an unbroken line of decisions have viewed clergy selection functions such as these as a forbidden territory where civil courts must not venture. That principle is seriously and unnecessarily eroded in the instant case.

It is the unquestioned right of the Massachusetts judiciary to declare the existence of a new tort cause of action, but it must do so in a way which does not interfere with matters at the very core of religious freedom. Should it become impossible to devise a procedure for advancing Rev. Mr. Alberts' case without a searching jury inquiry into religious polity and practice, fidelity to the religion clauses of the First and Fourteenth Amendments demands that Alberts' personal interests must yield, even at the cost of depriving him of money damages and other civil relief.

ARGUMENT

A.

THE STATE INTRUSION THREATENED HERE IS DIRECT AND PERVASIVE, NOT MERELY INCIDENTAL.

In the portion of the opinion below which has startled religious organizations throughout this country, the court has stated its position bluntly:

> ". . . In the circumstances of this case, the religion clauses of the . . . Constitution . . . do not preclude inquiry by the courts of the Commonwealth into church processes regarding the appointment and the discharge of ministers . . . ."

395 Mass. 59, 61.

* * *

> "[Petitioners'] argue that the principle enunciated . . . above precludes judicial inquiry . . . into the process by which the members of the Church voted to retire Alberts. We disagree."

395 Mass. 59, 72.

Language such as this cannot be found in any reported decision of this or any inferior court since the time of *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). It is tantamount to an outright grant of permission for jurors to roam through the religious proceedings culminating in Rev. Mr. Alberts' enforced retirement and to determine for themselves why such action was taken. This aspect of the decision must be promptly reversed.

Because the Court below defined its new tort action in terms which depend upon the perpetrator's "state of mind" (395 Mass. 59, 70), the jurors will need to sift through the religious consultative proceedings and probe the thought processes of Bishop Carroll, District Superintendent Barclay, and approximately 300 clergy peers who voted to deprive Alberts of his office. Likewise, since causation is at issue, the jurors will necessarily seek to find out what "really" prompted the religious officials to act. Their mission will be to determine questions such as these: What relative weight was assigned by Alberts' religious superiors to the medical information secured from Dr. Devine? Did it preponderate over the doctrinal, biblical and theological standards of the *Book of Discipline* so as to become the moving cause of Rev. Mr. Alberts' removal? The mere statement of these possibilities should make obvious the lack of civil court jurisdiction over such an undertaking.

The Massachusetts Court seeks to dismiss as insignificant the intrusion into the inner workings of the Church which its "inquiry" will engender. (395 Mass. 59, 75). Under the Court's formulation, state inquiry into Church processes is seemingly unobjectionable so long as it does not rise to the level of positive or continuous governmental intervention. (*Id.*) This plainly overlooks the law as stated by this Court in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 59 L.Ed.2d 533, 542 (1979). There, this Court, in declining to extend the jurisdiction of the NLRB to include bargaining by teachers in religious schools, said:

> "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the religion clauses, *but the very process of inquiry* leading to findings and conclusions." (Emphasis added).

Likewise, in a significant new decision of the Fourth Circuit in *Rayburn v. General Conference of Seventh Day Adventists, et al.*, ___ F.2d ___ (4th Cir., No. 84-1319, September 23, 1985 reproduced as Appendix A attached), the court ruled there was no subject matter jurisdiction to entertain a minister's Title VII race/sex discrimination case against the church which refused her a pastoral assignment. The court acknowledged that Title VII is an interest of great importance Nevertheless, it declined jurisdiction. It found that among several factors militating against plaintiff's position was the likelihood that EEOC and court involvement would inevitably result in substantial *inquiry* into religious proceedings:

> "Church personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process *designed to probe the mind of the Church in the selection of its ministers.*"

(Slip Opinion attached hereto as Appendix A at A-14) (Emphasis added).

These procedures are precisely what is threatened here. The court in *Rayburn* summed up the matter thusly:

> "It is axiomatic that the guidance of the state cannot substitute for that of the Holy Spirit and that a courtroom is not the place to review a church's determination of 'God's Appointed'." (*Id.* at A-13).

* * *

> ". . . We hold that the Constitution requires that civil authorities decline to review either the procedures for selection or the qualifications of those chosen or rejected . . . ." (*Id.* at A-15).

Contrary to the Massachusetts Court's analysis, the intrusion threatened here is scarcely incidental or transitory. Rather, it is direct, material and intimidating in its effect.

B.

THE COURTS HERETOFORE HAVE UNIFORMLY UPHELD AN ABSOLUTE PROHIBITION AGAINST STATE INTERFERENCE WITH SELECTION OF CLERGY.

For well over a century, the courts of this country have steadfastly resisted efforts by disaffected clergy and parishioners to involve themselves in the internal ecclesiastical workings and discipline of religious bodies. In *Watson v. Jones, supra* (decided on non-constitutional grounds), this Court made clear that the rule of deference to internal ecclesiastical decisions was not merely a matter of comity but one of basic subject matter jurisdiction. It quoted with approval from an earlier decision, saying:

> " 'This court . . . having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline . . . We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church.' "

(13 Wall at 730).

In more recent times, this and other courts have viewed the rule of deference not only in jurisdictional terms but as a constitutional command. And where disputes over the qualification and authority of the clergy have arisen, the courts have *invariably* declined to intervene. Thus, in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116, 119

(1952), this Court overturned a state effort to intervene in a church struggle over the selection of its hierarchy. The Court observed that religious guarantees extend to

> ". . . the power [of churches] to decide for themselves, free from state interference, *matters of church government as well as those of faith and doctrine.*" (Emphasis added).

Similarly, in *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 49 L.Ed.2d 151 (1976), this Court reaffirmed the principle, reversing a state supreme court which had overruled as "arbitrary" a religious tribunal's decision to defrock one of its bishops. The Court summarized its holding in clear and unequivocal terms:

> "In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them." (49 L.Ed.2d at 171).

Significantly, this Court, in *Serbian*, observed as follows:

> "Nor is there any dispute that questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern . . ." (49 L.Ed.2d at 167).

Many other cases have followed suit. In *Simpson v. Wells-Lemont Corporation, et al.*, 494 F.2d 490 (5th Cir., 1974), the court upheld dismissal, for want of subject matter jurisdiction, of a suit by an expelled United Methodist minister who had sought damages and other relief against his Bishop and denominational officials. The court said:

> "This case involves the fundamental question of who will preach from the pulpit of the church, and who will occupy the church parsonage. The bare statement of the question should make obvious the lack of jurisdiction of a civil court. *The answer to that question must come from the Church.*" (Emphasis added).

* * *

> "The interaction between the Church and its pastor is an integral part of Church government." 494 F.2d at 492, 493.

To the same effect, see *Kaufman v. Sheehan*, 707 F.2d 355, 358 (8th Cir., 1983); *Nunn v. Black*, 506 F.Supp. 444, 448 (W.D. Va., 1981); and the closely analogous decision of the Fourth Circuit in *Rayburn v. General Conference of Seventh Day Adventists, supra*, ____ F.2d ____ (4th Cir., No. 84-1319; September 23, 1985).

These cases demonstrate that ecclesiastical proceedings determining the qualification and discipline of clergy persons are at the core of religion and are inviolate. The prohibition is absolute. No exception has ever been made even to serve laudable government objectives and private rights as will next be shown.

C.

EVEN IF A BALANCING TEST UNDER *WISCONSIN v. YODER* IS APPLIED, THE RELIGIOUS INTERESTS HERE AT STAKE MUST PREVAIL.

Even assuming, *arguendo*, that the prohibition discussed above is not absolute and that the *Wisconsin v. Yoder* balancing test for religiously motivated conduct may now be extended to clergy selection, no compelling state interest is implicated here.

In *Wisconsin v. Yoder* (406 U.S. 205, 32 L.Ed.2d 15 (1972)), this Court said:

> "The essence of all that has been said and written on the subject [state regulation of religiously motivated conduct] is that *only those interests of the highest order and those not otherwise served* can overbalance legitimate claims to the free exercise of religion." (Emphasis added). 32 L.Ed.2d at 25.

The question, then, is the relative importance to be assigned to Massachusetts' new privacy tort and to Alberts' efforts to show proximate cause and to recover damages.

First, we note that laudable as the Massachusetts Court's objectives may be in declaring the new tort, the decision rests solely on "public policy" as that court perceives it. (395 Mass. 59, 67) The court's pronouncement lacks any other underpinning, either constitutional or statutory. Weighing against the court's public policy objectives are religious rights of a constitutional dimension. The absence here of a statute evidencing a legislative judgment is significant, for this Court has assigned lesser weight to "common law" in the church/state balancing process than to statutes. *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940).

Second, a striking feature of the decision below is the long period (twelve years) which intervened between Petitioners' assailed actions at issue and the court's decision to declare such actions a tort. This long history is hardly suggestive of an urgent and compelling state interest of the "highest order".

Third, as pointed out in the Statement of the Case, *supra*, the interests of Rev. Mr. Alberts were indeed "otherwise served" by a variety of judicial mechanisms and tribunals that were open to him within United Methodism up to its highest court. Respondent chose not to avail himself of these procedures and thereby failed to exhaust remedies which might have obviated the constitutional problem posed by the instant case.

Finally, the best guide for balancing interests in the present case is to consider decisions, to date, in which various private and state interests have been required to yield to the constitutional right of churches to choose their clergy. So important is the latter principle that the following individual causes of action, however meritorious, have failed because of their potential impact upon clergy selection:

—In *Kaufman v. Sheehan, supra,* 707 F.2d 355, 358 (8th Cir., 1983), a defrocked Roman Catholic priest was precluded from pursuing his tort claim (fraud)[1] against the Church based on certain alleged "conspiratorial" actions by his superiors who had, among other things, shared psychiatric information pertinent to his emotional condition.

—In *Simpson v. Wells-Lemont Corporation, supra,* 494 F.2d 490, 492 (5th Cir., 1974), an expelled United Methodist minister was barred from proceeding against his church under 42 USCA, Section 1981, on a theory of deprivation of his right to make and enforce contracts.

—In *Nunn v. Black, supra,* 506 F.Supp. 444, 447-448 (W.D. Va., 1981), expelled parishioners could not press their property and criminal trespass claims against church officials who acted against them.

---

[1] In *Gonzales v. Archbishop,* 280 U.S. 1, 16, 74 L.Ed. 131 (1929), this Court noted, by way of dictum, that there may be a "fraud" exception warranting "marginal" civil court review of ecclesiastical decisions. However, no life has ever been breathed into the "exception". In *Serbian, supra,* 49 L.Ed.2d 164, this Court commented that "no decision of this Court has given concrete content to or applied the 'exception' ". To the knowledge of *Amici,* no other court has done so either.

- —In *NLRB v. Catholic Bishop of Chicago, supra*, 440 U.S. 490, 59 L.Ed.2d 533 (1979), teachers in religiously operated schools were denied the right of union organization under NLRB auspices because such action presented a "significant risk" that First Amendment rights of church self-government would be infringed.
- —In *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir., 1972), the Court ruled that Congress in enacting Title VII of the Civil Rights Act, did not intend to intervene between a church and its clergy.
- —In *Rayburn v. General Conference of Seventh Day Adventists, supra*, ____ F.2d ____ (4th Cir., No. 84-1319, 1985), a rejected pastor's suit against her church for sex and race discrimination under the equal employment opportunity provisions of Title VII was dismissed in deference to the church's overriding right to freely choose its clergy.

When the state and private rights sought to be vindicated in the above listed cases are compared with the judicially created tort relied upon here by Rev. Mr. Alberts, there can be little doubt about the weight to be assigned to his claims for relief. They must be subordinated to the basic First Amendment rights here at stake.

D.

OTHER ALTERNATIVES MUST BE FOUND FOR IMPLEMENTATION OF THE NEW TORT CAUSE OF ACTION.

It is clear that the Massachusetts Court must fashion some means of implementing its new tort which will avoid injury to First Amendment freedoms. The most obvious way of accomplishing this would be to declare the tort *prospectively* instead of using the harsh *retroactive* application which has been given here. In such instance, the Church would at least have an opportunity to consider its actions and structure its affairs in a manner which would lessen the potential for a collision between church and state. In *Jones v. Wolf,* 443 U.S. 595, 61 L.Ed.2d 775, 786, n.4, this Court *in dictum* recognized that retroactive application of a new legal principle might, in certain circumstances, infringe upon the free exercise of religious rights. It also noted that in a property context, prospective application of a new legal doctrine has the salutory effect of enabling church organizations to react and tailor their affairs in a way which would maximize their ability to protect their properties. (*Id.*) No less an opportunity should be extended to churches in the present case.

Other methods to avoid church/state conflict might be employed. Even if the Massachusetts Court were to conclusively *infer* causation under defined circumstances, that course would be preferable to the fishing license it has granted the Alberts' jury.

But if all else fails, and it proves impossible to structure a procedure to avoid searching inquiry into religious polity and practice, it is submitted that Rev. Mr. Alberts' personal interests must then certainly yield to protect the constitutional values at issue here.

CONCLUSION

For all the reasons stated above, *amici* respectfully urge this Court to grant the Writ of Certiorari and to reverse the decision of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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CRAIG R. HOSKINS

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1319

Carole A. Rayburn,

Appellant,

versus

General Conference of Seventh-day Adventists,
  an unincorporated association;
General Conference Corporation of Seventh-day
  Adventists, a corporation;
Potomac Conference of Seventh-day Adventists,
  an unincorporated association;
Potomac Conference Corporation of Seventh-day
  Adventists, a corporation;
Kenneth J. Mittleider; and
James Londis;

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Walter E. Black, Jr., District Judge. (C/A 81-2202).

Argued: March 4, 1985 Decided: September 23, 1985

Before WINTER, Chief Judge, and SPROUSE and WILKINSON, Circuit Judges.

WILKINSON, Circuit Judge:

This case raises significant questions about the application of the civil rights laws to churches. The issue is whether a woman denied a pastoral position in the Seventh-day Adventist Church may charge that church wih sexual and racial discrimination under Title VII of the Civil Rights Act of 1964. The district court granted summary judgment to defendants on the grounds that the suit was barred by the religion clauses of the First Amendment. Because state scrutiny of the church's choice would infringe substantially on the church's free exercise of religion and would constitute impermissible government entanglement with church authority, we affirm the judgement of the district court.

I

Carole Rayburn is a white female member of the Seventh-day Adventist Church who holds a Master of Divinity degree from Andrews University, the church's theological seminary, and a Ph.D. in psychology from Catholic University. In 1979 she applied to appellee Potomac Conference, an administrative body within the church, for an Associate in Pastoral Care internship. At about the same time, she applied for a vacancy on the pastoral staff of the Sligo Seventh-day Adventist Church, one of the denomination's largest with a congregation of five thousand people at the church's world headquarters in Takoma Park, Maryland.

Rayburn hoped by securing the internship to be assigned to the Sligo Church vacancy. The pastoral staff of Sligo Church consists of the senior pastor and six associate pastors. The position of associate pastor may be held by an ordained minister, a ministerial intern (a male who has received seminary training but has not been ordained), or an associate in pastoral care (a female who has received seminary training but has a different title from her male counterpart because in the Seventh-day Adventist Church women may not stand for ordination).

Both the Sligo vacancy as an associate in pastoral care and the Potomac Conference internship were awarded to another woman. Upon learning of her rejection, Rayburn filed a complaint with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, alleging discrimination on the basis of her sex, her association with black persons, her membership in black-oriented religious organizations, and her opposition to practices made unlawful by Title VII. After receiving a right-to-sue letter, she filed the present action against the Potomac Conference and its President, Kenneth Mittleider, the pastor of the Sligo Church, James Londis, and the General Conference of Seventh-day Adventists, the governing body of the church which must formally approve all applications recommended by local bodies such as the Potomac Conference.[1]

Limited discovery focused on the nature of the associateship in pastoral care. Undisputed evidence showed that the Sligo Church position entailed teaching baptismal and Bible classes, pastoring the singles group, occasional preaching at Sligo and other churches, and other evangelical, liturgical, and counselling responsibilities. An associate in pastoral care may also receive a "commissioned minister credential" or a "commissioned minister license," although, as stated, she may never be ordained.

Rayburn did submit some evidence to support her claims of sexual and racial discrimination, but the district court for the District of Maryland granted defendants' motions for summary judgment. The court ruled that the General Conference of the church should be dismissed as a defendant because it had no involvement with Rayburn's application. It held further that a Title VII suit was barred in this instance by the religion clauses of the First

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[1] The original complaint also named as defendants the General Conference Corporation of Seventh-day Adventists and the Potomac Conference Corporation of Seventh-day Adventists. Both entities were dismissed by consent of the parties prior to the district court's decision.

Amendment. Contending that selection of an associate in pastoral care is not exempt from Title VII, Rayburn brings this appeal.

II

Before addressing the decision of the district court and the response of Rayburn, we must first determine whether Title VII and the First Amendment necessarily collide in this case. The Supreme Court has often noted that "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *International Association of Machinists v. Street,* 367 U.S. 740, 749-50 (1961); *accord, Curtis v. Loether,* 415 U.S. 189, 192 n.6 (1974); *Ashwander v. TVA,* 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). Such a construction is especially appropriate when a broader reading of the statute implicates the religion clauses of the First Amendment. In *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979), the Court, discussing the National Labor Relations Board's jurisdiction over lay teachers in parochial schools under the National Labor Relations Act, stated:

> In keeping with the Court's prudential policy it is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions. If so, we must first identify "the affirmative intention of the Congress clearly expressed" before concluding that the Act grants jurisdiction.

440 U.S. at 501, *quoting McCulloch v. Sociedad Nacional de Marineros de Honduros,* 372 U.S. 10, 21-22 (1963) (further citation omitted).

The application of Title VII to the employment relationship before us would definitely "give rise to serious constitutional questions." *See e.g. Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich,* 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94 (1952); *McClure v. Salvation Army*, 460 F.2d 535 (5th Cir.) *cert. denied*, 409 U.S. 896 (1972). Although we would prefer to avoid those questions, we do not believe that such a course is fairly open to us. The language and the legislative history of Title VII both indicate that the statute exempts religious institutions only to a narrow extent. Section 702 of Title VII, as amended, 42 U.S.C. § 2000e-1 (1982), provides:

> This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals *of a particular religion* to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. (emphasis supplied).

The wording of § 702 may fairly be construed to prohibit some forms of state involvement in ecclesiastical decisions of employment. If, for example, a religious institution were to present "convincing evidence" that an employment practice favored members of one faith or denomination over another, "§ 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination." *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980).

While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin, *see EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1277 (9th Cir. 1982); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 282 (5th Cir. 1981); *EEOC v. Mississippi College*, 626 F.2d at 484; *McClure v. Salvation Army*, 460 F.2d at 558.[2] The statutory exemption applies to one particular reason for employment decision—that based upon religious preference. It was open to Congress to exempt from Title VII the religious employer, not simply one basis of employment, and Congress plainly did not.

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[2] Here, of course, one member of the Seventh-day Adventist Church was selected over another of that same faith for reasons appellant allege pertain to race and sex.

The legislative history reinforces the plain meaning of the statutory text. The original Act passed by the House in 1964 excluded religious employers from coverage altogether, H.R. Rep. No. 914, 88th Cong., 1st Sess. (1964), *reprinted in* 1964 *U.S. Cong. & Admin. News*, 2391, 2402. The final version excluded such employers only with respect to discrimination based on religion, and then only with respect to persons hired to carry out the employer's "religious activities." P.L. 88-352, Title VII, § 702, 78 Stat. 255 (July 2, 1964), *reprinted in* 1964 *U.S. Cong. & Admin. News* 287, 304. In 1972 the statute was amended to delete the word "religious," P.L. 92-261, § 3, 86 Stat. 103 (March 24, 1972), but Congress specifically rejected proposals to broaden further the scope of the exemption. Subcommittee on Labor of the Committee on Labor and Public Welfare of the United States Senate, Legislative History of the Equal Employment Opportunity Act of 1972 (Comm. Print 1972), at 1229-1230, 1258-1260. To the contrary, the analysis pertaining to § 702 states clearly that "Such organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin." Section-by-Section Analysis of H.R. 1946, the Equal Employment Opportunity Act of 1972, *reprinted in id.* at 1844, 1845.

We cannot impose upon a statute a limiting construction where to do so would strain congressional intent. Given the wording of the statute and the history behind it, we conclude that Title VII, by "the affirmative intention of the Congress, clearly expressed," *Catholic Bishop*, 440 U.S. at 501, applies to the employment decision in this case. We must turn, therefore, to the constitutional questions.

III

The "wall of separation" between church and state, *Everson v. Board of Education,* 330 U.S. 1, 16 (1947) has become a "variable barrier." *Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971), as Congress has enacted comprehensive legislation to achieve desirable goals.[3] Tensions have developed between out cardinal Constitutional principles of freedom of religion, on the one hand, and our national attempt to eradicate all forms of discrimination, on the other.[4]

Each person's right to believe as he wishes and to practice that belief according to the dictates of his conscience so long as he does not violate the personal rights of others, is fundamental to our system. *Sherbert v. Verner,* 374 U.S. 398, 402-403 (1963). This basic freedom is guaranteed not only to individuals but also to churches in their collective capacities, which must have "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952). Ecclesiastical decisions are generally inviolate; "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical policy on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law," *Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 713 (1976). The right to choose ministers without government restriction underlies the well-being of religious community, *see Kedroff,* 344 U.S. at 116, for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrine both to its own membership and to the world at large.[5]

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[3] *See* D. Laycock, Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Columbia L. Rev. 1373 (1981), citing as examples the National Labor Relations Act, the Fair Labor Standards Act, the Civil Rights Act of 1964, and the Federal Unemployment Tax Act. *Id.* at 1373.

[4] *See* B. Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 Columbia L. Rev. 1514 (1979).

Any attempt by government to restrict a church's free choice of its leaders thus constitutes a burden on the church's free exercise rights. We next inquire whether "there is a state interest of significant magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *see also Sherbert v. Verner*, 374 U.S. 403 (1963). It would, of course, be difficult to exaggerate the magnitude of the state's interest in assuring equal employment opportunities for all, regardless of race, sex, or national origin. There remains, then, for examination the decisive criterion developed by the Court in *Wisconsin v. Yoder* to resolve a free exercise question: a balancing of the burden on free exercise against the "impediment to . . . [the state's] objectives that would flow from recognizing the claimed . . . exemption." 406 U.S. at 205.

Here that balance weighs in favor of free exercise of religion. The role of an associate in pastoral care is so significant in the expression and realization of Seventh-day Adventist beliefs that state intervention in the appointment process would excessively inhibit religious liberty. The associate in pastoral care at Sligo Church is, according to undisputed evidence, pastoral advisor to the Sabbath School that introduces children to the life of the church. She also leads small congregational groups in Bible study. As counselor and as pastor to the singles group, the associate in pastoral care is once again a liaison between the church as an institution and those whom it would touch with its message. Such counseling requires sensitivity both to the human problems of the congregation and to the church's message of comfort in the face of those problems. Never are people more in need of spiritual leadership than when they turn to a pastor for help in dealing with their most difficult moments. Finally, the selection of the associate in pastoral care to stand on the platform during services, to lead out the congregation during the church's solemn rites, and to preach occasionally from the pulpit places the imprimatur of the church upon that person as a worthy spiritual leader to whom members may look for consultation, example, and guidance in their own lives and in the life of the congregation as a corporate body.

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[5] The free exercise rights of an organized church may appear, upon occasion, to infringe upon the religious liberties of individual members. We discern no such litigable conflict here, however, for the Court in *Kedroff* and *Milivojevich* has warned of the dangers of interposing government between church and believer. No member of a church may claim, under the First Amendment, an enforceable right to be considered or accepted by the church hierarchy as a minister. The dissident or dissatisfied must, under *Milivojevich*, generally look elsewhere for resolution of such grievances.

Any one of these functions so embodies the basic purpose of the religious institution that state scrutiny of the process for filling the position would raise constitutional problems; when all functions are combined, the burden of potential interference becomes extraordinary. This burden is not diminished by the fact that lay church members may on appropriate occasions be called upon to participate in one or more of these activities or to serve in similar capacities in teaching and counseling each other. Lay ministries, even in leadership roles within a congregation, do not compare to the institutional selection for hire of one member with special theological training to lead others.

The fact that an associate in pastoral care can never be an ordained minister in her church is likewise immaterial. The "ministerial exception" to Title VII first articulated in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972), does not depend upon ordination but upon the function of the position, *EEOC v. Southwestern Baptist Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982). "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.' " Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 Columbia L. Rev. 1514, 1545 (1979). This approach necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church, *see Southwestern Seminary*, 651 F.2d at 283. In the instance before us, the evidence is simply overwhelming that it is.

While it is our duty to determine whether the position of associate in pastoral care is important to the spiritual mission of the Seventh-day Adventist Church, we may not then inquire whether the reason for Rayburn's rejection had some explicit grounding in theological belief. Emphasis on the role of an associate in pastoral care rather than the reasons for Rayburn's rejection underscores our constitutional concern for the unfettered right of the church to resolve certain questions. The fact that the Seventh-day Adventist Church does not ordain women, the asserted scriptural basis for that practice, and the influence or lack thereof of this restriction in Rayburn's case do not influence our analysis. In "quintessentially religious" matters, *Milivojevich*, 426 U.S. at 720, the free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content.

The magnitude of the free exercise burden need not always obscure the magnitude of the state's interest embodied in Title VII. In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), the Supreme Court noted that "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest," but with the caveat from *Wisconsin v. Yoder*, 406 U.S. at 215, that nevertheless "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." 450 U.S. at 718. As Title VII is an interest of the highest order, courts have held that Title VII properly applied to the secular employment decisions of a religious institution, such as those relating to a secular teacher in a church-approved school, *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981), or editorial secretary in a church publishing house, *EEOC v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982). But courts must distinguish incidental burdens on free exercise in the service of a compelling state interest from burdens where the "inroad on religious liberty" is too substantial to be permissible. *Thomas v. Review Board*, 450 U.S. at 718. This case is of the latter sort: introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state. While an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to the free exercise of religious beliefs. The balance of values thus weighs against Rayburn's suggestion that the government may question the decision of the Seventh-day Adventist Church to hire another candidate as an associate in pastoral care.

IV

To subject church employment decisions of the nature we consider today to Title VII scrutiny would also give rise to "excessive government entanglement" with religious institutions prohibited by the establishment clause of the First Amendment, *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).[6] Under *Lemon*, entanglement is measured

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[6] *Lemon* proposes three tests for determining the validity of a statute under the establishment clause: "First, the statute must have a secular legislative purpose; second, its principal or primary

(Footnote continued on following page)

by the "character and purposes" of the institution affected, the nature of the benefit or burden imposed,[7] and the "resulting relationship between the government and the religious authority." 403 U.S. at 615.[8] These criteria require us to decline examination of the Seventh-day Adventist Church's decision here.

Appellant seeks to bring within the purview of Title VII the church itself, the institution with which the danger of entanglement is most sensitive. If the dangers of entanglement were severe with respect to parochial schools,

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[6] *continued*
effect must be one that neither advances nor inhibits religion; . . . finally, the statute must not foster 'an excessive government entanglement with religion.' " 403 U.S. at 612-613 (citations omitted). There is no question that Title VII meets the first two of these tests.

[7] As the statutes under discussion in *Lemon* provided benefits to parochial schools, the Court stated its criteria only in positive terms, whereas here we consider a potential burden on a religious institution. We see no reason why the dangers of entanglement are diminished in the latter situation. The risk of entanglement is not limited to situations where there is state assistance or sponsorship of a religious institution. *Walz v. Tax Commission of the City of New York,* 397 U.S. 664, 674 (1970) (either taxation or exemption of churches would raise questions of entanglement). The dangers of entanglement are posed where there exists a continuing close administrative relationship in core areas of faith that poses the possibility of secular approval granted or withheld from religious denominations. *NLRB v. Catholic Bishop of Chicago,* 440 U.S. at 502. While the administrative relationship here constitutes a burden on the religion—and hence implicates free exercise values—we think that the First Amendment is also independently concerned that "a comprehensive, discriminating, and continuing state surveillance will . . . involve excessive and enduring entanglement between state and church." *Lemon v. Kurtzman,* 403 U.S. at 619; *Aguilar v. Felton,* 53 U.S.L.W. 5013 (1985).

[8] We recognize that the Court has recently indicated that the *Lemon* test is not necessarily the only appropriate means for deciding an establishment question. *Lynch v. Donnelly,* ____ U.S. ____, 104 S.Ct. 1355, 1362 (1984). Nevertheless, the framework of that case seems well suited to questions which involve the relationship of government to religious institutions.

Aguilar v. Felton, 53 U.S.L.W. 5013 (1985); *Lemon, supra,* they are all the more serious with respect to the church itself. While schools may serve both secular and sectarian functions, the purpose of the church is fundamentally spiritual, and the danger of "interaction between church and state," *Lynch v. Donnelly,* ____ U.S. ____, 104 S.Ct. 1355, 1364 (1984), is what the establishment clause protects against.

The application of Title VII to employment decisions of this nature would result in an intolerably close relationship between church and state both on a substantive and procedural level. On a substantive level, the unrefuted evidence from appellee Potomac Conference emphasized the importance of "spirituality" as an attribute of an associate in pastoral care and stated that in making an appointment, "The guidance of the Holy Spirit is always sought so that the one chosen can be God's appointed, as well as the one who has the support of his/her fellow churchmembers." It is axiomatic that the guidance of the state cannot substitute for that of the Holy Spirit and that a courtroom is not the place to review a church's determination of "God's appointed."

Moreover, the goals of a church in the selection of its spiritual leaders and of a governmental agency in the performance of its statutory mandate may not be the same. The Equal Employment Opportunity Commission may or may not share the values of any given church, whose highest priority is simply one of fidelity to its own beliefs and practices. The danger is that choices of clergy which conform to the preferences of public agencies may be favored over those which are neutral or opposed. The church's selection may at times result from preferences wholly impermissible in the secular sphere.[9] Where goals differ, the temptation for state intrusion becomes apparent. But "[e]ven if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal." Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Columbia L. Rev. 1373, 1399 (1981). Where the values of state and church clash or where there is a differing emphasis among priorities or as to means in an employment decision of a theological nature, the church is entitled to pursue its own path without concession to the views of a federal agency or commission. Bureaucratic suggestion in employment decisions of a pastoral character, in contravention of a church's own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority and compromise the premise "that both religion and government can best work to achieve their lofty aims if each is left free of the other within its respective sphere." *McCollum v. Board of Education*, 333 U.S. 203, 212 (1948).

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[9] For example, some churches, like the Seventh-day Adventist, do not permit the ordination of women.

On a procedural level, entanglement might also result from a protracted legal process pitting church and state as adversaries in disregard of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). "[P]ervasive monitoring by public authorities . . . infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." *Aguilar v. Felton*, 53 U.S.L.W. at 5016. A Title VII action is potentially a lengthy proceeding, involving state agencies and commissions, the EEOC, the federal trial courts and courts of appeal. Church personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers. The remedies that a district court may impose, 42 U.S.C. §2000e-5(g) (1982), may be far-reaching in their impact upon religious organizations. Even after entry of judgment, questions of compliance may result in continued court surveillance of the church's policies and decisions. In *Catholic Bishop*, the Supreme Court, holding that church-operated schools were not subject to NLRB jurisdiction, noted that "It is not only the conclusions that may be reached by the Board which may infringe on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." 440 U.S. at 502. The same is true here. There is the danger that churches, wary of EEOC or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members.

Of course churches are not—and should not be—above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions. *See, e.g., EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981) (Title VII could be applied to promotion of secular teacher in religious educational institution); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) (Title VII applicable to administrative and support staff at a seminary); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (editorial secretary at church-affiliated publishing house); *Whitney v. Greater New York Corporation of Seventh-day Adventists*, 401 F.Supp. 1363 (S.D.N.Y. 1975) (typist-receptionist). Without adopting or rejecting the specific rulings of such cases, we hold that the Constitution requires that civil authorities decline to review either the procedures for selection or the qualifications of those chosen or rejected here.

The decision of the district court is

AFFIRMED.

PEABODY & ARNOLD

COUNSELLORS AT LAW

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October 3, 1985

Samuel Witwer, Jr., Esq.
125 South Wacker Drive
Chicago, Illinois 60606

Re: Edward Carroll & John Barclay
v. William Alberts & Donald Devine
Supreme Court Docket No. 3624

Dear Mr. Witwer:

By this letter we give consent to the filing by your organization of an amicus curiae brief in connection with our petition for certiorari in the above case.

Very truly yours,

Deborah S. Griffin

Deborah S. Griffin

DSG:nlf

RECEIVED
OCT 7 1985
WITWER, MORAN, BURLAGE & WITWER

APPENDIX B

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17
October
1985

Samuel W. Witwer, Jr., Esquire
Witwer, Moran, Burlage & Witwer
Attorneys at Law
Suite 2700
125 South Wacker Drive
Chicago, Illinois 60606

Re: United States Supreme Court
Edward G. Carroll and John E. Barclay, Petitioners
v. William E. Alberts and
Donald E. Devine, Respondents

Dear Mr. Witwer:

In accordance with Rule 36 of the Rule of the United States Supreme Court and on behalf of John E. Barclay, petitioner in the above case, II consent to the filing of a brief or briefs amicus curiae by the General Council on Finance and Administration of the United Methodist Church and by the National Council of the Churches of Christ in the United States of America in the above petiton for writ of certiorari.

Very truly yours,

Florence E. Freeman

FEF/me

APPENDIX C

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October 9, 1985

RECEIVED
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WITWER, MORAN, BURLAGE & WITWER

Samuel W. Witwer, Jr.
Witwer, Moran, Burlage & Witwer
125 South Wacker, Suite 2700
Chicago, Illinois 60606

Re: Alberts v. Devine

Dear Mr. Witwer:

I have fully discussed, with Dr. Alberts, your request for my assent to your filing of an amicus brief in the United State Supreme Court. Dr. Alberts has decided that he will not assent to your filing of such an amicus brief and has instructed me to notify you of this decision and forward to you a copy of his letter to me on this point.

I realize that I had initially indicated that our assent would be forthcoming and I regret any inconvenience that this may cause you. However, given the history of this litigation and the history of the treatment of Dr. Alberts by the defendants in this case, I am not surprised in the least that he has chosen to withhold his assent.

Sincerely,

Robert J. Doyle

RJD:lcm

cc: William E. Alberts

APPENDIX D

The COMMUNITY CHURCH of BOSTON

WILLIAM E. ALBERTS, Ph.D.
Minister
REV. DONALD C. LOTHROP
Minister Emeritus

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565 BOYLSTON STREET
BOSTON, MASSACHUSETTS 02116
COMMONWEALTH 6-6710

October 9, 1985

Attorney Robert J. Doyle
9 Hamilton Place 3rd Floor
Boston, MA 02108

Dear Rob:

I am strongly opposed to the General Council on Finance and Administration of The United Methodist Church filing an amicus brief as a friend of the US Supreme Court on behalf of petitioners/co-defendants Bishop Edward G. Carroll and former District Superintendent John E. Barclay.

In his letter of October 3, 1985, the General Council's attorney, Samuel Witwer, Jr. would have us believe, "We do not represent individual Methodists or officials, but rather, attempt to represent the broader interests of faith in litigation involving legal and constitutional questions." If this were true, the General Council on Finance and Administration and its legal counsel would be opposing Bishop Carroll and Rev. Barclay's appeal to the US Supreme Court instead of seeking to file an amicus brief on their behalf.

Bishop Carroll and Rev. Barclay's appeal to the US Supreme Court is based on an argument that would sacrifice the right of privacy of all United Methodist ministers: that I gave up my right of privacy when I became a United Methodist minister, that in going to my former psychiatrist without my knowledge and permission they were fulfilling "their sacred calling" and exercising "their rights of freedom to engage in religiously motivated conduct authorized under Church law"(co-defendants PETITION to the US Supreme Court, pages 8, 10 and 11), and that their behavior is protected by the 1st and 14th Amendments of the Constitution. If the US Supreme Court decides to hear their appeal and they win, all United Methodist ministers lose their right of privacy-- and possibly other ministers as well.

The General Council on Finance and Administration's filing of an amicus brief would serve the very opposite purpose of any "attempt to represent the broader interests of faith in litigation involving legal and constitutional questions." It would represent injustice in the name of "the faith".

In becoming a friend of the Court in this case, the General Council would become an enemy of its own ministers-- and possibly other clergy as well-- who would lose their right of privacy if Bishop Carroll and Rev. Barclay are successful in their attempt to

APPENDIX E

The COMMUNITY CHURCH of BOSTON

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get the US Supreme Court to bail them out and keep supressed all the evidence of their criminal abuse of their authority.

On behalf of my former United Methodist minister colleagues and all United Methodist ministers-- and other clergy-- I urge the General Council on Finance and Administration of The United Methodist Church to initiate its own internal investigation of the issues surrounding and the roles Bishop Carroll and then Superintendent Barclay played in my forcible removal from the United Methodist ministry. Such an internal investigation would truly serve "the broader interests of the faith." Please forward a copy of this letter to attorney Samuel Witwer, Jr.

Sincerely,

William E. Alberts
William E. Alberts